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ADOLPH M. SCHWARZ,
Plaintiff in Error,

vs.

LEO WEIL, WILLIAM W.
McLAUGHLIN and HARVEY M.
ADAMS,
Defendants in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDENT JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of replevin against the defendants to recover Illinois Supreme Court reports, (volumes 1 to 317 inclusive) and Illinois Appellate Court reports (volumes 1 to 234), together with other law books. The books were taken on the writ by the bailiff and delivered to the plaintiff. On a trial of the case before the court without a jury there was a finding and judgment in defendants' favor and a writ of returne habendo awarded. From that judgment plaintiff prosecutes this appeal.

The record discloses that Adolph M. Schwarz, the plaintiff, lived in New York but conducted a collection agency in Chicago, employing defendant Weil to act as his attorney here. Schwarz owned the books in question and they were in his place of business in the First National Bank Building, Chicago. Weil began work for plaintiff about December 15, 1921. In the early part of 1925 the Chicago Bar Association made complaint against plaintiff to the effect that he was practicing law in Chicago without being authorized to do so. The matter was taken up with a Committee of the Bar Association. Weil procured counsel for plaintiff and assisted in the matter, appearing on several different evenings before the committee. As a result of the hearing plaintiff was required to separate his law department from the collection de-

partment; thereupon Weil secured offices a short distance from Schwarz's offices and on the same floor, having direct telephone connection with plaintiff's offices. The law books were removed to the new office by Weil, who continued in the employ of Schwarz, the plaintiff. After Weil had taken the new office and removed the books, new volumes of reports as they came out were delivered to Schwarz by Callaghan & Co., and in turn they were taken to Weil's office, Schwarz paying for them. The last of the books in question were delivered in October, 1925, and were paid for by Schwarz on March 9, 1926. Schwarz had a running account with Callaghan & Co., the law publishers. In November, 1926, Weil ceased to act as attorney for Schwarz, and afterwards went into partnership with the other defendants and turned in the books above mentioned as part of his contribution to his new firm, claiming that Schwarz had made a gift of the books to him. From time to time Schwarz endeavored to obtain return of the books but without success, and thereupon the removal suit was instituted.

In deciding the case the court said that the burden was on the plaintiff to prove his case by preponderance of evidence, that he was of opinion that plaintiff had not sustained the burden, and "that plaintiff relied upon the deposition of a Mr. Fine and the defendant relied chiefly on the testimony of Mr. Weil;" that the court had the advantage of seeing Mr. Weil, "while Mr. Fine's testimony was merely a written statement; and continuing said: "And outside of that there was not a great deal of testimony to help the court either way, so that the court cannot say that the plaintiff made out a case by a preponderance of the evidence."

We have carefully considered all the evidence in the record, and although having in mind the fact that the trial court

saw a number of the witnesses before him while we have only the printed page before us, yet we are clearly of the opinion that substantially all the evidence in the record shows that the books belonged to plaintiff and that he was entitled to have the judgment in his favor.

The evidence shows, without dispute, that the books in question were bought and paid for by plaintiff and that on account of the action of the Chicago Bar Association Schwarz was required to separate his legal department from his collection agency, and that thereupon Weil, his attorney, moved into a nearby office in the same building, taking with him the books, and still remaining in plaintiff's employ; that books were delivered by the publishers to Schwarz's office after Weil had removed the books from Schwarz's offices, and were paid for by Schwarz.

We think it clear from Weil's own testimony that the books belonged to Schwarz. Weil was called as a witness for the defendants and testified that he was attorney for Schwarz from about December 15, 1921, until about the middle of November, 1925; that in the early part of 1925 the Bar Association made a complaint against Schwarz, as a result of which the legal department of his Chicago business was separated from the collection department; that he, Weil, took the books with him to the new offices he had rented, but still continued to represent Schwarz more than a year thereafter or until November, 1926. He further testified that there was a direct telephone connection between his office and the switchboard in Schwarz's office which was paid for by Schwarz; that after he moved from Schwarz's office Schwarz came from New York to Chicago and dropped into the witness' office and said to the witness, "You have very nice offices. I see you have all my books here. I said 'yes.' He said, 'You can have those books,' and went out." He further testified that a few months thereafter

he was advised by Schwarz that he was about to reduce his, Weil's, salary from \$100 to \$75 a week; that he then went to New York and there saw Schwarz about the matter; that he objected to any reduction in his salary and said that he would not continue to represent Schwarz if the salary paid him were reduced; that Schwarz stated it was absolutely necessary to reduce the expense of the Chicago office; that the witness then said, "I will make a cut for a short period of time, but I want it restored as soon as the matters about which Thorner complains are cleaned up;" that Schwarz then said, "Do you use those books in your office?" and he said, "No." He said, "Well, then, you can keep those books; you can have them." That was all that was said about the books." He further testified that afterwards he had a talk with plaintiff's Chicago representative and the latter said to him, "I am having a lot of trouble getting these books from Jones' office" (Adams being one of the former partners of Weil and to whom Weil had turned over the books); that the witness replied, "If you think you are entitled to the books, go and get them." The witness was then asked a question to refresh his recollection as to whether Schwarz had not told the witness that he could give him the books for the work the witness had done in behalf of Schwarz before the Bar Association. In reply to this the witness stated that Schwarz said to the witness, "I contemplate making you my personal representative to act for one purpose or another, a sort of a good-will representative for me" and he said that "he appreciated the services which had been rendered by me as his attorney in Chicago and told me in that conversation that those books were mine." Weil further testified that a few days after the books were received, in the instant case, he had a talk with Thorner, plaintiff's Chicago representative, and told Thorner that he was informed that he had taken a great many books on the revolving writ that did not belong

to plaintiff; that Thorner then asked him to point out such books, and witness mentioned certain books. "I told him that he had taken a lot of books and cases that did not belong to him;" that thereupon Thorner and himself went to the lawyer's office where the books were located and discussed the matter after looking over the books.

After several witnesses had testified Weil was called in rebuttal and testified that at the time he had the conversation with Thorner he did not state that the plaintiff had taken books on the writ that did not "belong" to him, but that he had a statement from Callaghan's which showed that certain books had been paid for by Schwarz; that the word "belong" had not been used by him.

Other witnesses gave testimony tending to show that the books were bought by the plaintiff and paid for by him and there is little or no contradiction of this evidence. If the books belonged to Weil, or he now claims, it is strange that he never stated that fact before the suit was brought, nor after the suit was brought until the time of the trial. His own testimony shows that after the books were replevied he stated to plaintiff's representative that certain books had been taken which did not belong to the plaintiff; but nowhere does he say that the books were his, nor does it appear anywhere in the record that he testified that Schwarz had given him the books in consideration of the services he had rendered before the Committee of the Bar Association. Substantially all the evidence in the record shows that the books in question were bought and paid for by the plaintiff and were not given to Weil.

Considerable is said in the briefs to the effect that no demand had been made for the books before they were taken on the writ, but this is not borne out by the record, because it appears that repeated demands had been made. But whether a demand

had been made or not is of no consequence because it is obvious that such a demand would have been unavailing, and in such circumstances no demand is required. The law never demands that a useless thing be done. Lea v. Chancell. Co. v. Pennsylvania Co., 291 Ill. 248; Johann v. Hays, 2 Gilman 242; Grant v. Greger, 28 Ill. 74; Nat. Bond & Investment Co. v. Baker, 23 Ill. App. 608; A. & P. Co. v. West American L. Co., 244 Ill. App. 521. In the first of case the referee's report is the matter in issue and on the trial, were confined to the books, and therefore a demand would have been unavailing. In the other cases a demand is required.

Counsel for the defendants say in their brief that plaintiff received from the bailiff books under the writ that were not specified in the return on writ. Among such books so claimed to have been delivered to the bailiff were volumes 235, 236 and 237 of the Appellate Court Reports. An examination of the bailiff's return on the writ fails to disclose that such books were taken by the bailiff. The return shows that the bailiff turned over to the plaintiff the books mentioned in the writ with certain exceptions, but it does not show that any books not mentioned in the writ were taken. The writ describes the Appellate Court reports as volumes 1 to 234 inclusive. So it appears from the record that the Appellate Court volumes above mentioned were not taken by the bailiff on the writ.

A further point made by the defendants is that in their brief they move this court to strike the bill of exceptions from the record because it was not filed in apt time. This motion is not made in apt time and cannot be entertained. Rule 16 of this court requires that a copy of all motions to be made with the reasons therefor shall be served on counsel for the opposite party at least a day before they shall be filed with the clerk. It then

provides that the court will take up and pass upon the motion. The motion now made is not in accordance with the rule which contemplates that motions of this character shall be disposed of before the briefs are filed, and not argued in the briefs together with any other matters on the merits. Moreover, even if the point were properly before us, it is without merit. The trial Judge certified and found as a fact that counsel for plaintiff did all they could to obtain the approval and filing of the bill of exceptions within the time allowed, but they were unable to do so on account of the absence of the trial Judge from the jurisdiction of the court. This is all that the law requires. People v. Rosenwald, 266 Ill. 549.

The judgment of the Municipal court of Chicago is reversed and the cause remanded with directions to enter a proper judgment awarding the costs to the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely and Katchett, JJ., concur.

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HELEN SERVATI,
Appellee,

vs.

EVENING AMERICAN PUBLISHING
COMPANY, a Corporation,
Appellant.

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APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages for personal injuries. There was a verdict and judgment in her favor for \$3,000 and the defendant appeals.

The record discloses that on October 9, 1925, plaintiff, a woman about fifty years of age, as she was walking across Western avenue, a north and south street in Chicago, was struck and injured by a motor vehicle belonging to the defendant.

The defendant contends that the judgment is wrong and should be reversed because on the motion for a new trial the court stated that he would require plaintiff to remit \$1,000 from the amount of the verdict, and that if this were done the defendant ought to waive its right to appeal. The defendant refused to waive such right, whereupon the court over-ruled its motion for a new trial and judgment was entered on the verdict for \$3,000. The record discloses that when the motion for a new trial came on for hearing the court stated that he thought the verdict was excessive and he would require the plaintiff to enter a remittitur of \$1000. He then stated that if this were done the defendant ought to be required to waive its right to appeal from the judgment for \$2000. To this suggestion counsel for the defendant demurred; there was further consideration of the matter and it is clearly apparent that the court upon further reflection considered the verdict not excessive and over-ruled the motion for a new trial.

A further point made is that the verdict is excessive; that even if there were liability, plaintiff's injuries were so slight that a verdict of \$3,000 is excessive. In reply to this contention counsel for plaintiff says that the verdict is not excessive, and further says that in any event the amount is justified by reason of the fact that there were two counts of the declaration which charged willful and wanton negligence. There is no merit in this latter contention because the question whether there was wanton and willful negligence on the part of the defendant was in no way submitted to the jury. Counsel for plaintiff submitted an instruction on the question of damages, which was given, which told the jury that in determining the amount of damages, if any, to which plaintiff was entitled, they should award her fair compensation. Vindictive or punitive damages may be allowed where the negligence is wanton or willful; but the instruction above mentioned showed that this question was eliminated from the consideration of the jury. Whether the verdict is excessive on the ground that the amount awarded is more than a fair compensation for the injuries sustained, need not be considered here for the reason that we have reached the conclusion that the judgment must be reversed on other grounds which will be hereinafter referred to.

A further complaint made by the defendant is that the court erred in giving plaintiff's instruction No. 12, which was the instruction offered by plaintiff on the question of damages; the objection to this instruction being that the jury were told that if they found for the plaintiff they might award her damages for future suffering and loss of health. Defendant contends that there was no evidence that the injuries sustained by plaintiff were in any way permanent. We think the objection is untenable because there is evidence to the effect that plaintiff was still suffering

as result of the injuries at the time of the trial.

A further point is that the court permitted a physician to testify on behalf of the plaintiff that she appeared to be "aging;" that at the time he examined her, shortly after the injury, she told the physician that she was fifty years of age and that she appeared at the time of the trial to be a woman of sixty to sixty-five years of age. We think this objection should have been sustained. There was no evidence of any kind tending to show that premature age had resulted in any manner from the injuries plaintiff received. Moreover, we think it improper because plaintiff appeared and testified before the jury, and they were able to pass upon her physical appearance without the aid of the doctor's testimony.

It is also contended that counsel for plaintiff made improper argument to the jury in that he stated that plaintiff had not sued the driver of the truck; that she was not asking him for any money; that he was the servant of the defendant corporation, and that plaintiff was suing it for damages. This argument was improper and should not have been made. But if this were the only error we would not reverse the judgment, because it did not, we think, prejudicially affect the defendant.

A further contention is made that the defendant was guilty of no negligence, and therefore the court should have sustained its motion for a directed verdict. We think this contention cannot be sustained. There was some evidence that the truck in question, which was being operated by one of defendant's servants in delivering its newspapers, was traveling at the rate of forty miles an hour just before it struck the plaintiff. The evidence shows that there was considerable traffic at the place in question, and it is obvious that if the jury believed the testimony as to the rate of speed of the truck, they would be

warranted in finding defendant negligent in the operation of the truck.

The contention that the judgment should be reversed because the evidence discloses that plaintiff was guilty of contributory negligence, as a result of which she was injured, must be sustained. The evidence shows that plaintiff on the day in question had been working at a point west of Western avenue; that she left her place of employment, walked east on the north side of 16th street to Western avenue, then on the west sidewalk of Western avenue a considerable distance north of 16th street, then in a northeasterly direction across the roadway of Western avenue and was struck as she was in the east or north-bound street car track in Western avenue. The accident happened at about 5:15 o'clock in the afternoon of October 9th in broad daylight. It is obvious that plaintiff was not in the exercise of due care for her own safety and that the finding of the jury to the contrary is against the manifest weight of the evidence.

Plaintiff might recover although guilty of contributory negligence if the defendant were guilty of wanton and willful negligence. Gray v. Waldren Express & Van Co., 291 Ill. 472. Yet the question whether the defendant was guilty of wanton and willful negligence in no way was submitted to the jury. Plaintiff in two counts charged the defendant with wanton and willful negligence, but the jury was not instructed on this phase of the case; on the contrary they were told that the plaintiff could not recover unless the jury believed that she was in the exercise of due care and caution for her own safety.

Since we hold that under the evidence in the record plaintiff could not recover except on the ground that the defendant was guilty of willful and wanton negligence, and

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since that question was eliminated the judgment of the Superior court of Cook county must be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, J., concurs.

Katchett, J.: I agree to the conclusion but not to all that is said in the opinion.

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the problem and the objectives of the investigation. The second part of the report is a detailed description of the methods used in the study. This includes a description of the experimental apparatus, the procedures used for data collection, and the methods used for data analysis. The third part of the report is a discussion of the results of the study. This includes a description of the data obtained, a comparison of the results with previous work, and a discussion of the implications of the findings. The final part of the report is a conclusion, which summarizes the main findings of the study and provides recommendations for further research.

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L. H. SOHN and C. M. SOHN, Copartners
Trading as L. H. SOHN & COMPANY,
Appellees,

vs.

NEW YORK INDEMNITY COMPANY, a
Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action on a fidelity insurance bond against the defendant to recover the loss they had sustained by reason of the dishonesty of one of their employees. There was a verdict and judgment in plaintiffs' favor for \$5,000 and the defendant appeals.

The record discloses that on April 20, 1925, plaintiffs, who were engaged in business in Chicago and who on that date were employing Arthur Edward Dilly as bookkeeper, stenographer and for general office work, obtained from the defendant, for a valuable consideration, its standard fidelity bond whereby defendant agreed to indemnify the plaintiffs against loss, not exceeding \$5,000, of money or other personal property, through the fraud, dishonesty, forgery, theft, embezzlement or wrongful abstraction of Dilly; that Dilly went to work for plaintiffs and a few months thereafter began to abstract money from plaintiffs and to convert it to his own use. His dishonesty was not discovered until he had been in plaintiffs' employ for about a year. He was discharged and an auditor was employed by plaintiffs, at the request of defendant, to ascertain the amount Dilly had stolen. The audit showed that the moneys abstracted by Dilly from time to time aggregated \$3847.99. The auditor charged \$1200 for the work he did and it was agreed on the trial that this was a reasonable charge for the services rendered. The

defendant denied liability and thereupon plaintiffs brought the instant suit to recover the two sums above mentioned and \$500 attorney's fees, which latter item apparently was abandoned by plaintiffs.

The evidence shows that three or four months after Dilly was employed he began to steal plaintiffs' money. The method adopted by Dilly was that he would make out checks to his own order, as was the custom, fill out the check stub properly, have one of plaintiffs sign the check, then raise the amount of the check, but not change the check stub, cash the check at the bank, use the amount of money for which the check was originally made out in the payment of plaintiffs' office expenses and pocket the excess.

It further appears from the evidence that when plaintiffs discovered Dilly's dishonesty they immediately informed the defendant and it, through its manager, requested plaintiffs to employ an auditor so that the exact amount Dilly had stolen could be ascertained; this was done with the result above stated. The evidence further shows that when Dilly's dishonesty was discovered the defendant took the matter up with him and he agreed to make restitution, and that he or his wife paid \$600 to defendant, which defendant still retains; that about the same time Dilly went to the defendant's place of business in Chicago and made a written confession, which he signed and swore to before a notary public on June 24, 1926. In this confession Dilly stated in substance that during the 13 months he had been employed by plaintiffs as book-keeper he was required to handle cash and checks and to make deposits in the bank; that at different times "I made certain alterations and changes in checks given to me to be cashed and also committed other forgeries by which means I secured certain sums of money belonging to my employer, L. H. Sonn & Company, which mon-



I appropriated to my own use;" that he could not state accurately the exact amount of money he had embezzled. He further stated in this confession, "I hereby willingly confess my guilt in this matter and I do so without any threats or promises having been made to me by anyone."

Sometime afterwards plaintiffs had Dilly arrested and apparently the matter was brought up in the Municipal court and the defendant on the trial of the instant case sought to show that afterwards Dilly was indicted by the grand jury of Cook County and that on a trial in the Criminal court he was discharged. The court refused to allow defendant to make this proof. In addition to this offer of proof by the defendant it introduced in evidence an application signed by one of plaintiffs requesting the defendant to issue the fidelity bond. This application is dated May 4, 1925, and contains a number of questions and answers, the pertinent parts of which are that Dilly had been recently employed by plaintiffs; that he was a new employee; that his position was to be bookkeeper, stenographer and general office work; that he would handle cash for plaintiffs' payroll and that the largest sum he would be likely to hold at one time would be \$500. "Q. 10. Have you so systematized your business that books, accounts and vouchers kept by other employees will serve as a check upon this employee in such position and enable you by an examination and comparison to detect and discover any act of fraud or dishonesty on the part of this employee? A? Daily system. Q. 11. (a) How often will a thorough examination of employee's books and accounts be made by an auditor or expert accountant; and cash, securities, etc., be counted, compared and verified with accounts and vouchers? A. Semi-yearly. (b) When was such an examination of employee's books and accounts, cash and securities, last made? A. (1) Date 3/31/25. (2) By whom made? A. F. W. Menast. (c) Were they

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in every respect accurate? A. Yes."

There were further questions and answers not necessary to be referred to here, and following them was this paragraph: "The foregoing answers are warranted to be true and the truth of each thereof is a condition precedent to the creation of any liability under the indemnity desired."

In an endeavor to show that Dilly had not stolen plaintiffs' money the defendant called him to the stand and he testified that he went to work for plaintiffs in 1925 and continued in their employ until May 31, 1926; that four or five months after he started to work he had a talk with L. H. Sohn, one of the plaintiffs; that nobody else was present; that Sohn told him that he wanted him, Dilly, to do him a favor; that Sohn said, "I want you to raise some checks for me;" that the witness replied, "All right, you are paying me for my work, so I will do it;" that afterwards he made out checks, that L. H. Sohn signed them and had the witness raise the amount of the check; that thereupon the witness took the checks to the bank and had them cashed; that he would use the amount for which the check was originally made out in payment of some salaries of plaintiffs' employees, and would give the balance to L. H. Sohn; that there were four or five of these transactions monthly; that the witness was asked by L. H. Sohn to leave plaintiffs' employ because he, Sohn, was having a fuss with his brother, the other plaintiff; that there was no audit made of plaintiffs' books about the year 1926, although there was some talk about it; that the witness never retained any money obtained by him on the raised checks, but gave all the excess to H. H. Sohn. The witness admitted he made the confession above mentioned, and testified that he signed it at the request of L. H. Sohn; that L. H. Sohn told him to do anything the Bonding company wanted so that he would not have any more quarrels with his brother, the other plaintiff, and that the statement contained in his written confession wherein he

1. The first part of the report deals with the general situation of the country and the progress of the work during the year. It is divided into two main sections: the first section deals with the general situation of the country and the progress of the work during the year, and the second section deals with the specific results of the work.

2. The second part of the report deals with the specific results of the work. It is divided into three main sections: the first section deals with the results of the work in the field of agriculture, the second section deals with the results of the work in the field of industry, and the third section deals with the results of the work in the field of commerce.

3. The third part of the report deals with the financial results of the work. It is divided into two main sections: the first section deals with the income of the organization, and the second section deals with the expenditure of the organization.

4. The fourth part of the report deals with the administrative results of the work. It is divided into two main sections: the first section deals with the organization of the work, and the second section deals with the personnel of the organization.

5. The fifth part of the report deals with the social results of the work. It is divided into two main sections: the first section deals with the social work of the organization, and the second section deals with the social work of the personnel of the organization.

6. The sixth part of the report deals with the cultural results of the work. It is divided into two main sections: the first section deals with the cultural work of the organization, and the second section deals with the cultural work of the personnel of the organization.

7. The seventh part of the report deals with the scientific results of the work. It is divided into two main sections: the first section deals with the scientific work of the organization, and the second section deals with the scientific work of the personnel of the organization.

8. The eighth part of the report deals with the educational results of the work. It is divided into two main sections: the first section deals with the educational work of the organization, and the second section deals with the educational work of the personnel of the organization.

9. The ninth part of the report deals with the health results of the work. It is divided into two main sections: the first section deals with the health work of the organization, and the second section deals with the health work of the personnel of the organization.

10. The tenth part of the report deals with the sports results of the work. It is divided into two main sections: the first section deals with the sports work of the organization, and the second section deals with the sports work of the personnel of the organization.

admitted his dishonesty was not true; that when he was discharged L. H. Sorn gave him \$100 to go away. He then testified that after his defalcations were discovered, "I gave the insurance company a sum of money approximately \$600; that was my wife's money. I had nothing to do with it." On cross examination Dilly testified that after he was discharged he talked with DeShields, defendant's general manager, about the shortage or loss, and further that when he signed the confession at the defendant's office plaintiffs were not present. Defendant did not call DeShields, its manager, or any of its employees.

The defendant contends that the application and the policy or fidelity bond must be construed together as making one contract between the parties, and that when this is done there is no liability. In support of this it is said that although the policy is dated April 20, 1925, and the application is not dated until about two weeks thereafter, viz, May 4th, yet they must be construed together for the reason that it is a well known custom in insurance matters such as in the instant case, for the assured to apply for a bond at the counter; that thereupon the indemnity company will issue its binder immediately protecting the applicant until investigation can be made and a policy written, and that afterwards an inspector calls upon the assured and secures the application. There is no evidence in the record on this point, and we think it is obvious that courts do not take judicial notice of such a custom, if it exists. The policy no where makes the application a part of it, and we think under the rule of law which construes such contracts strictly against the defendant in such cases, the application cannot be considered a part of the contract. But even if we consider the application as being a part of the contract between the parties, we think the contentions of the defendant can not be maintained. One of these contentions is that there was no contract or binding obligation entered into by the parties and that

the policy or bond was void ab initio for the reason that plaintiffs in their application dated May 4, 1935, stated that they had an audit made of the employee's books on March 1, 1935; that the books were found to be correct and that this statement made by plaintiffs was known by the plaintiffs to be false, because the evidence shows "to our surprise" that Dilly was not employed until April 20th. We are unable to understand how plaintiffs' answer to a question in the application to the effect that the books had been examined and found correct on March 1st could in any way affect defendant in the instant case. There is no contention that Dilly stole any money before March 1st. He was not employed until April 20th and there is no evidence in the record that plaintiffs' answer to this question in any way affected the defendant. The argument of the defendant in this respect is wholly without merit.

It is also said that plaintiffs' answer to question 10, above quoted, to the effect that there was a daily system of checking Dilly's work, and that plaintiffs' answer to a question stating that Dilly would not likely have in his possession at one time more than \$600, rendered the policy void. The evidence shows that Dilly never had in his possession at one time as much as \$600, and the checks which he raised were never more than half that amount. The answer to question 10 did not state that by plaintiffs' system Dilly's account would be checked daily. The question was whether plaintiffs had so systematized their business that books, accounts and vouchers kept by plaintiffs' employees other than Dilly would serve as a check upon Dilly and enable plaintiffs to detect and discover any dishonesty of Dilly, and the answer was "Daily system." The answer is indefinite; it does not say that plaintiffs' other employees kept other books. Moreover, there is some evidence that plaintiffs went over Dilly's books but did not discover any defalcation, and the

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point now urged seems not to have been considered upon the trial.

The defendant contends that the contract between the parties was void from the beginning because the application provided that plaintiffs' answers to the questions in the application were warranted to be true and the truth of which is "a condition precedent to the creation of any liability under the indemnity desired;" and that since plaintiffs stated in the application that a semi-annual audit of Dilly's books would be made, the provision of the application above quoted rendered the contract void. We think there is no merit in this contention. Plaintiffs' statement in the application that a semi-annual audit would be made was a mere declaration of an intention. Plaintiffs' answer to the question was meant to be nothing more than a declaration of the course intended to be pursued and will not prevent the plaintiffs from maintaining this action. Benham v. Assurance Co., 7 Welsty, Marlstone & Gordon (33 enc.) 744.

The defendant further contends that it was not liable for the \$1200 paid the auditor for making an audit of plaintiffs' books, showing the amount Dilly had stolen. The policy or bond provided that plaintiffs, whenever required to do so by the defendant, would give the defendant all the information they possess "at the request and cost of the Surety, aid in securing information and evidence." And the testimony shows without contradiction that the defendant's manager requested that an auditor be employed to go over the books, which was done. We think the defendant was liable for the cost of the audit.

Complaint is made that the court erred in refusing to admit in evidence a certified copy of the indictment returned by the grand jury of Cook county and other evidence showing that the defendant in that case was discharged. This evidence was clearly inadmissible and the ruling was correct. Cammarano v.

Migano, 234 Ill. App. 553.

A further point is that the court erred in admitting in evidence the written confession of Billy and the reason for this as stated by the defendant's counsel is "because at the time the statement was made no privity of interest or relationship existed between Billy and the defendant surety company." There is no merit in this contention. Defendant's argument seems to be based upon the theory that it was a mere surety and that Billy was the principal. Cases of this character are cited. This is a misconception. The defendant was not a surety in the fidelity bond. It was an original undertaking that the defendant made direct to plaintiffs. Billy was not a party to that contract at all.

The statement made by Billy in the form of a confession was clearly admissible. It was corroborated by other competent testimony that he had abstracted and appropriated to his own use nearly \$4,000 of plaintiffs' money. Moreover, he testified on the stand that he signed and swore to the confession. Nor is there any merit in the contention that statements made by DeShields, defendant's general manager, were inadmissible because it was hearsay. The evidence shows that DeShields told plaintiffs to have an audit made, which was done, and took the entire matter up with plaintiffs. He was defendant's general manager, representing defendant, and what he said and did was admissible against the defendant.

At the request of the defendant the jury were instructed that if they believed from the evidence that Billy had raised the checks at Sohn's request and gave the excess money to Sohn, the plaintiffs could not recover. Of course the jury did not believe Billy's testimony; no sane person would believe such testimony. All of the evidence shows that Billy was a thief. The raised checks, the abstraction of money and the appropriation of it to his own use had been shown by convincing evidence. Billy had

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Lichtenthaler and Sponholz (1980).

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signed and sworn to the written confession wherein he admitted his dishonesty. The entire defense interposed in this case does not appeal to a court of justice. There is no merit in it, and the judgment of the Circuit court of Cook County is therefore affirmed.

APPEALS.

McSweeney and Hatchett, JJ., concur.

1. The first part of the report
 2. The second part of the report
 3. The third part of the report
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 7. The seventh part of the report
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 9. The ninth part of the report
 10. The tenth part of the report

32858

ALFRED NELSON,
Appellee.

vs.

CARROLL C. FIGGE and BERNHARD P.
BOHRINGER, Doing Business as
CHICAGO WATERPROOFING & ROOFING CO.,
Appellants.

25 K.A. 605⁴

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendants to recover \$411.00 on account of damages which he claimed to have sustained by reason of the poor workmanship of the defendants in constructing a roof on a building for plaintiff. Defendants deny that they constructed the roof in an unworkmanlike manner. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for the amount of his claim, and this appeal followed.

The record discloses that plaintiff was constructing an apartment building at the corner of Campbell and Fargo avenues, Chicago, and employed the defendants to roof the building, which defendants did at an agreed price of \$220, and which sum was paid, the work having been done about November 3, 1926. On April 19th following there was a severe wind storm in Chicago and part of the roof was blown off and all of the roof so damaged that it was necessary to put on a new roof. The day of the storm plaintiff called defendants to the building to show them the damage and requested them to repair the roof, which plaintiff claimed defendants had guaranteed for a period of five years. Defendants refused to repair the damage, claiming that the guarantee which they gave plaintiff did not cover wind storms such as the one that caused the damage. Thereupon plaintiff employed another party engaged in the roofing business in Chicago to put a new

roof on the building, which was done at an expense to plaintiff of \$263. On account of the roof being blown off plaintiff was required to do some calcimining and decorating, for which he paid \$148, and he claimed this sum from the defendants, his total claim being \$411, and, as stated, after a hearing his claim was allowed in full.

Both parties seek to agree that a written contract was entered into between the parties whereby the defendants agreed to cover the roof on plaintiff's building for \$220, and that the contract contained the following provision: "The above roofing is guaranteed for a period of five years;" and that in the specifications attached to and made a part of the contract there was the following provision: "The roof carries our five year written guarantee." The parties further agreed that the work to be done by defendants was to be in accordance with the following specifications:

"Directly over the roof boards apply one layer of thirty pound asphalt felt, each layer lapped two inches over preceding layer. This felt to be nailed with large head roofing nails, spaced six inches apart at laps and twelve inches apart through longitudinal center of sheet.

"Over this thirty pound felt, apply a layer of roofing asphalt.

"Into this layer of asphalt, while hot, apply one layer of fifteen pound asphalt felt, each layer lapped three inches over preceding layer.

"Over this fifteen pound felt apply a layer of roofing asphalt."

As we understand it, plaintiff's contention is that the covering of the roof installed by defendants was not a good and proper covering because the defendants did not use as many nails as the specifications require; that in place of the nails being spaced six inches apart at the tops and twelve inches apart through the center of the sheet, they were not so spaced at the tops and that they were from 18 to 24 inches apart through the center, and plaintiff's contention seems to be that the roof was blown off the building on account of the failure to use the

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number of nails required by the written specifications.

The evidence shows that on about November 3rd or 4th, 1926, when defendants completed their work, which work was done in about a day and a half, and for which they were paid by plaintiff, they sent to plaintiff the following document:

"To Alfred Nelson:

We hereby guarantee the roof covering applied on building, listed and described below, for a period of five years expiring November 3, 1931 - Building, southwest corner of Campbell and Fargo Avenues, Chicago. This guarantee provides maintenance due to faulty materials or improper workmanship. It does not provide maintenance to roof covering damaged by fire, tempest, or other extraordinary acts of providence. Given under our hand and seal this third day of November, 1926.

Chicago Waterproofing Company,
By - E. F. Bohringer."

The above document apparently was received by the plaintiff in due course of mail and was produced by him on the trial at the request of defendants. Both parties further seem to agree that the roof covering used by defendants was what is known as a two-ply asphalt covering, and that the roof which the plaintiff had put on the building to repair the damage done by the storm was what is known as three-ply gravel roof.

At the close of the evidence the court, at the request of the plaintiff, found as a fact that the roof covering put on the building by the defendants was not done in accordance with the specifications in that the nails were not spaced as required by the written specifications; and further found that this was a latent defect. The court refused to find as a fact that the wind storm that caused the damage was not a tornado or such a storm as the defendants might have anticipated; and further refused to find that the roof covering called for by the specifications was not suitable for the purpose to which it was put.

Upon a careful examination of all the evidence in

the record, we are unable to say that the finding of the trial Judge to the effect that the nails were not spaced as required by the specifications is against the manifest weight of the evidence. Witnesses for the plaintiff testified - although their testimony is not very specific - that the nails were spaced much farther apart than required by the specifications; while witnesses for the defendants testified that the nails were driven into the roof covering as the specifications required. One witness testified that they were driven closer than required by the specifications. In the record before us there is shown a breach of the contract on the part of the defendants, but there is no evidence that the roof was blown off because insufficient nails were used. We think opinion evidence is necessary on this point. Scully v. Hawking, 227 Ill. App. 610 (not reported); Blodgett v. Revious, 199 Ill. App. 544. Obviously the defendants would not be liable for any damage (except nominal) unless it was brought about by some failure on their part to perform their work in accordance with the contract.

There is no dispute that the defendants put a two-ply asphalt covering on the roof. This was what the plaintiff ordered and we are unable to see how the defendants would be liable to pay the cost of installing a three-ply gravel roof, even if the damage were caused through the fault of the defendants. The evidence shows that the three-ply gravel roof cost \$263, while the two-ply asphalt covering was put on at a cost of \$220. It is therefore obvious that in the present state of the record the amount of damages awarded plaintiff for this item is unwarranted. Whether the liability of the defendants, if any, is to be measured by the provision contained in what is stated to be the written contract and specifications as above quoted, or by the provision of the written guarantee mailed on or about November 3rd, above re-

1. The first part of the report deals with the general situation of the country and the progress of the work during the year. It is divided into two main sections: the first section deals with the general situation of the country and the progress of the work during the year, and the second section deals with the specific results of the work.

2. The second part of the report deals with the specific results of the work. It is divided into three main sections: the first section deals with the results of the work in the field of agriculture, the second section deals with the results of the work in the field of industry, and the third section deals with the results of the work in the field of commerce.

3. The third part of the report deals with the conclusions and recommendations. It is divided into two main sections: the first section deals with the conclusions, and the second section deals with the recommendations.

4. The fourth part of the report deals with the appendix. It contains a list of the names of the persons who have taken part in the work, a list of the names of the persons who have given evidence, and a list of the names of the persons who have been consulted.

ferred to, we think it is unnecessary to pass upon, because plaintiff's statement of claim which sets forth his cause of action was not predicated upon a breach of any guarantee on the part of the defendants, but on the theory of a breach of the contract, in that the defendants had not installed the covering as the contract required. Of course, if the evidence shows that plaintiff was damaged by reason of the failure of defendants to install the covering as the contract requires, he would be entitled to recover such damages from the defendants.

For the errors above mentioned, the judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and Hatchett, JJ., concur.

25 I.A. 606

JOHNSON OFFICE EQUIPMENT
COMPANY, Inc., a Corporation,
Plaintiff in Error,

vs.

COWHAM ENGINEERING COMPANY,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED HIS OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover \$1376.38, claimed to be due from the defendant for the balance of the purchase price of office furniture which it had sold and delivered to the defendant. There was no dispute as to the amount of plaintiff's claim, but the defense interposed was that there was an accord and satisfaction. The cause was tried before the court without a jury and there was a finding and judgment in defendant's favor and this writ of error followed.

The record discloses that plaintiff sold and delivered to the defendant furniture at a price of \$6,151.54. There were certain deductions made from this sum and the defendant paid plaintiff \$4,000 on account, leaving the balance for which plaintiff sues. The evidence further shows that some time prior to the sale of the furniture in question, E. A. Johnson, an officer of plaintiff corporation, had some business dealings with John L. Senior, who is the president of the defendant corporation, and Johnson being indebted to Senior made and delivered his promissory note to Senior for \$1,000. The interest on this note was computed to May 1, 1926, so that the total amount due from Johnson to Senior on the note was \$1278.33. It further appears that the plaintiff corporation demanded payment by the defendant corporation of the balance of the purchase price of the furniture, and on July 14th the defendant corporation wrote the plaintiff a letter in which was en-

closed the promissory note above mentioned. The note was marked "cancelled." The defendant also enclosed its check to plaintiff's order for \$748.17, which sum together with the amount then due on the note made up the amount still remaining due and unpaid on the furniture. The check and note were tendered to the plaintiff in full settlement of the account. Plaintiff refused to accept the proposition and returned the check and cancelled note to the defendant. Some time afterwards Johnson, representing the plaintiff, called on the defendant and took the matter up with Senior and demanded payment of the balance in full. Senior insisted that they would not pay the bill unless plaintiff would take a check for \$748.17 and the cancelled note in full for its claim, and a check for this sum was tendered to Johnson. This check, as well as the check of July 14th, has a voucher attached which stated that the check was in full of the account. Johnson protested at the time, but took the check and cashed it. The cancelled note was still retained by Senior. This is all of the material evidence in the record.

We are clearly of the opinion that there was no accord and satisfaction under the law. There was no dispute between the parties as to the amount of the balance due, and the defendant had no right over the objection of the plaintiff to pay plaintiff's bill by delivering plaintiff a check for part of its claim and Johnson's cancelled note. The transaction between Johnson and Senior was an individual transaction and not part of plaintiff's or defendant's business, and defendant by paying part of the amount, which it admitted was due, was not released from paying the balance, although it tendered its check, stating that if it were accepted it would be in payment in full. The law is that where the amount due a creditor is ascertained and not in dispute, the payment by the debtor and the acceptance by the creditor of a

less sum will not operate as a satisfaction of the demand. Snow v. Griesheimer, 220 Ill. 106.

There being no defense to plaintiff's demand, the court erred in not entering judgment in plaintiff's favor, and since there is no dispute in the evidence of the amount due and owing from the defendant to the plaintiff, and since there was no jury, the judgment of the municipal court is reversed and judgment entered in this court in favor of the plaintiff and against the defendant for \$1376.38.

The judgment of the municipal court is reversed and judgment entered in this court.

JUDGMENT REVERSED AND JUDGMENT ENTERED.

McSurely and Ketchett, JJ., concur.

CHARLES R. THOMPSON et al.,
Appellees,

vs.

JAMES H. HOOPER,
Defendant.

JAMES H. HOOPER,
Appellant.

INTERLOCUTORY APPEAL FROM

CIRCUIT COURT OF COOK

COUNTY.

MR. PRESIDING JUSTICE O'CONNOR

DELIVERED THE OPINION OF THE COURT.

By this appeal James H. Hooper, one of the defendants, seeks to reverse an order entered by the Circuit court of Cook county on November 13, 1928, enjoining him from prosecuting a certain suit then pending in the Municipal court of Chicago and from molesting or disturbing complainants and their tenants in the occupancy of certain real estate, and from doing any act towards securing possession of such real estate.

On November 13th complainants filed their bill praying for an injunction against the defendants. The bill was verified and on the face of the bill the court entered the order appealed from without notice to the defendants. The order required that defendants file a bond in the sum of \$500. The bond was filed and approved on the following day, November 14th.

On this appeal the defendant Hooper contends that the order is wrong and should be reversed because it was entered without notice and because the bill does not state any cause of action.

The allegations of the bill in substance are: That Charles R. Thompson and Elizabeth H. Thompson, his wife, the complainants, owned, in fee simple, certain described real estate in Chicago, improved by a two-flat building, one of the flats being occupied by them and the other by their tenants, and that they had so owned and occupied the premises continuously for a period of

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six years prior to April, 1927, and from that date had been in continued undisputed possession of the premises and occupied one of the flats as their residence and homestead; that there was a mortgage on the premises securing an indebtedness of \$3350; that in November, 1923, complainants were indebted to Milo E. Jordan in the sum of \$295, and on that date made and executed their promissory note to Jordan for that amount, due March 15, 1924; that on the latter date, being unable to pay the note, they executed to Jordan a new note for the same amount, due sixty days after date; that on June 27, 1924, they paid the promissory note to Jordan and demanded that Jordan surrender the note to them; that he promised to do so but stated that he had lost or mislaid the note and that as soon as he found it he would mark it paid and return it to them.

The bill further alleged, upon information and belief, that Jordan did not sell, transfer or assign for value the promissory note to A. W. Hoffman, nor to any other person; that upon information and belief Hoffman, the alleged holder of the note, did not acquire the same in good faith; that he acquired the same after the maturity of the note without giving anything in value for it; that Hoffman was associated with or employed by William R. Wiley, one of the defendants; that about April 4, 1927, Hoffman and Wiley procured a judgment on the promissory note to be entered by confession against the complainants in favor of Hoffman in the Municipal court of Chicago. The judgment was for \$382.81, which included \$25 attorney's fees; that afterwards on April 12, 1927, Hoffman procured the issuance of a writ of execution on the judgment rendered in the Municipal court, delivered it to the bailiff and directed him to have the judgment satisfied; that the bailiff made no demand upon complainants under the execution, but on April 20, 1927, levied on the premises in question, and that on May 13th

following the bailiff sold the premises in question with the improvements thereon to Lawrence Weiss for \$420.33, being the amount of the Municipal court judgment and costs; that thereupon the bailiff gave a certificate of sale to Weiss; that on May 24, 1927, the bailiff returned the execution with his endorsement thereon; that on August 18, 1928, the period of redemption on the bailiff's alleged sale expired, and on September 26, 1928, the bailiff executed and delivered to the defendant Bertha Hooper his deed purporting to convey the real estate to her; that she had not placed the deed of record. It is further alleged upon information and belief that Bertha F. Hooper conveyed the premises to the defendant James H. Hooper, the date of such conveyance being unknown, and that James H. Hooper had not placed the deed of record.

The bill further alleged that Hoffman, Wiley, James H. Hooper and Bertha F. Hooper, his wife, at all times knew all of the facts hereinabove mentioned; that they fraudulently obtained possession of the promissory note and that they fraudulently conspired and conspired with each other to procure the entry of a judgment upon the note by confession, the issuance of the execution, and the bailiff's sale, as above set forth; that complainants never had notice or knowledge of the entry of the judgment or any of the other proceedings mentioned until after the period of redemption had expired in August, 1928.

The bill further charged that the defendant James H. Hooper, makes a regular business of frequenting execution sales where real estate to be sold is of a value substantially more than the judgment lien; that he was formerly a lawyer and well informed in the matters of law and that he had full knowledge and notice of the matters hereinabove mentioned; that the real estate in question was worth \$15,000 and was subject only to the encumbrance of \$3,500 secured by a mortgage as stated; that no appraisal was made of the

property in question before the alleged sale by the bailiff of the Municipal court and that complainants' homestead was not set forth.

It is further alleged that Hooper on September 6, 1928, served notice on complainants' tenant that he was the owner of the premises and demanded immediate possession of the same and the payment of all rents to him; that upon receiving such notice, the tenant advised complainants of the fact, and this was the first information or notice complainants had of the proceedings in the Municipal court. It was further alleged that James H. Hooper on October 2, 1928, commenced a suit against the tenant for the collection of the rent; that the suit was still pending and set for trial November 14, 1928. The prayer was that the defendants be enjoined from making any claim under the Municipal court judgment, that the premises be declared free from any lien or encumbrance by virtue of the Municipal court proceedings, and that Hooper be enjoined from taking any further action in the Municipal court case or interfering with the complainants or their tenants in the occupancy of the premises. The affidavit to the bill set up that if notice were given to the defendants that an application was to be made for a temporary restraining order, Hooper would convey, encumber or cloud the title of the premises.

We think the bill of complaint states a cause of action. If complainants had paid the note as alleged, then the Municipal court proceedings, the issuance of an execution and the sale of the premises were all fraudulent and void; and it is alleged that Hooper was cognizant of all the facts, and that he fraudulently conspired to obtain the note and judgment. Nor do we think any notice of the application for an injunction was necessary. The affidavit attached to the bill sets up that if Hooper were advised that an application was to be made for a temporary restraining order, he would convey, encumber, or cloud the title to the premises. On this appeal we must presume that the allegations of the bill are true; and in view of

the allegations, we think a court of equity ought not to be too solicitous in reference to the giving of notice to the defendant Hooper of the application for the preliminary restraining order. If the allegations are true, as we must assume, the judgment of the Municipal court was fraudulently obtained with the knowledge and connivance of Hooper.

The order of the Circuit court of Cook county is affirmed.

AFFIRMED.

McSurely and Hatchett, JJ., concur.

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25 Feb. 1906³

MERCIVAL B. COFFIN, as administrator
of the estate of Nellie Katherine
Nahand, deceased,

Plaintiff in Error,

v.

CHICAGO CITY RAILWAY COMPANY,
CHICAGO RAILWAYS COMPANY,
CALUMET & SOUTH CHICAGO RAILWAY
COMPANY and SOUTHWEST STREET RAILWAY
COMPANY,

Defendants in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is the companion to case No. 32782 consolidated with this for hearing and in which an opinion has this day been filed. In the instant case, the decedent was Nellie Katherine Nahand. The facts in this case are virtually identical with those in the other case.

For the reasons therein stated the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) and (2) under the conditions (3) and (4).

2. In the second part, we shall consider the case when the functions $f_i(x)$ and $g_i(x)$ are linear functions of x . In this case, the system of equations (1) and (2) can be written in the form

$$A_1 x + B_1 y = C_1, \quad A_2 x + B_2 y = C_2, \quad (5)$$

where A_i, B_i, C_i are constants. In this case, the system of equations (5) can be solved by the method of elimination. The solution of the system (5) is given by the formulas

$$x = \frac{C_1 B_2 - C_2 B_1}{A_1 B_2 - A_2 B_1}, \quad y = \frac{A_1 C_2 - A_2 C_1}{A_1 B_2 - A_2 B_1}. \quad (6)$$

3. In the third part, we shall consider the case when the functions $f_i(x)$ and $g_i(x)$ are quadratic functions of x . In this case, the system of equations (1) and (2) can be written in the form

$$A_1 x^2 + B_1 x + C_1 = 0, \quad A_2 x^2 + B_2 x + C_2 = 0, \quad (7)$$

$$D_1 x^2 + E_1 x + F_1 = 0, \quad D_2 x^2 + E_2 x + F_2 = 0, \quad (8)$$

where $A_i, B_i, C_i, D_i, E_i, F_i$ are constants. In this case, the system of equations (7) and (8) can be solved by the method of elimination. The solution of the system (7) and (8) is given by the formulas

CLIFFORD HALL by Albert T. Hall,
his Next Friend,)

Appellee,)

vs.)

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

CHICAGO & WEST TOWNS RAILWAY
COMPANY, a Corporation, and C. D.
GAMMON COMPANY, a Corporation,
Defendants below.)

Appeal of CHICAGO & WEST TOWNS
RAILWAY COMPANY, a Corporation,
Appellant.)

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Clifford Hall, plaintiff, thirteen and a half years of age, was injured February 12, 1924, on Chicago avenue, in Oak Park, Illinois. He brought suit against the Chicago & West Towns Railway Company, a corporation, hereinafter called the defendant, and C. D. Gammon Company, a corporation. At the conclusion of plaintiff's case the court instructed the jury to find the C. D. Gammon Company not guilty. The trial proceeded as to the Railway company and resulted in a verdict against it for \$8500. From the judgment thereon defendant appeals.

Plaintiff's declaration asserted that he was injured through the negligent management of one of defendant's street cars. The accident happened about one o'clock p. m., on Chicago avenue, which runs east and west, near Austin boulevard, which intersects it. The easterly terminus of defendant's street car tracks is at Austin boulevard.

Plaintiff and a companion, Adolph Reisman, were at this place watching for a chance to ride westerly on Chicago avenue on some passing vehicle. They got on a west-bound motor truck operated by the Gammon Company. The driver of this truck drove the boys off, but they got on again. There is a variance in the evidence as to whether the driver knew they got on the second time,

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1984, p. 112, fn. 23

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although the greater weight indicates that he did not know this. The trial court was of this opinion and instructed the jury to find the Gamson Company not guilty upon the theory that the boys were trespassers on the truck.

Reineman got on the rear of the truck; plaintiff got on the side near the rear wheel and sat down on the floor with his feet extended in front of him on a narrow ledge extending beyond some upright stakes and remained in that position until the happening of the accident. The truck was loaded with long iron pipes which extended about four feet beyond the end. There was considerable snow on the street and ruts had been formed near the street car tracks. The truck proceeded westerly on Chicago avenue approximately in the north street car tracks with its south wheels in the rut between the tracks, while an east-bound street car belonging to defendant was approaching on the south tracks nearing the terminus at Austin boulevard. There is variant testimony as to the speed of the vehicles as they approached each other. Both were going slowly, the truck approximately six or eight miles an hour, and according to nearly all the witnesses the street car was going about five or six miles an hour. Neither vehicle stopped and in passing the rear end of the pipes on the truck collided with the street car, resulting in the injuries to plaintiff. There is no definite testimony as to how he was injured, but the most reasonable inference from the circumstances is that he was jolted off the truck and thrown to the ground.

Plaintiff's theory is that when the truck and the street car were about twenty-five feet apart, the truck turned to the north to turn out of the ruts, thus bringing the rear in line with the approaching street car, which continued without stopping, the front of the car striking the truck and injuring the plaintiff.

Defendant's theory is that, as the vehicles approached

each other there was ample clearance but that, after the rear of the truck had passed the front vestibule of the street car the driver of the truck, without warning, turned his front wheels to the north and/rear of his truck skidded towards the street car, and the pipes extending beyond the rear of the truck struck the street car just back of the front vestibule door, throwing the plaintiff to the ground, where he was dragged until the vehicles were stopped.

Plaintiff testified, in substance, that, while on the truck he saw the street car approaching. It was running possibly six or seven miles an hour, while the truck was traveling five or six miles an hour; that as they proceeded towards each other the tail-end of the truck seemed to swerve a little because of the front wheels being turned out of the ruts and the street car struck the truck; that he "thought he was in a perfectly safe position."

Another witness, Pittelkow, testified that the street car came along "slacking up a little and came in right with the truck;" that the iron pipes extended about four feet back of the truck; that he heard the pipes scraping alongside the car, which then stopped, as did the truck. The boy then lay in the rear of the street car.

The motorman testified that as he approached Austin boulevard he was going about five or six miles an hour; that he saw the truck coming west and, provided the truck continued straight west, there was about a foot and a half clearance between it and the side of the street car; that he saw the plaintiff sitting on the side of the truck; that the part of the truck on which plaintiff was riding passed the front of the vestibule and that at this time plaintiff was a foot and a half from the side of the vestibule. The witness next heard the scraping of the pipes

alongside the car, back of the vestibule. There were no marks on the vestibule and no glass broken.

There was ample testimony confirming the motorman to the effect that there was sufficient clearance between the vehicles and that the rear end of the truck suddenly skidded into the side of the street car after it had passed the front vestibule. The most impressive evidence confirming this version is the marks on the side of the car, beginning back of the vestibule, and none at any point on the vestibule. Almost all of the witnesses refer to the hind wheels of the truck "skidding" into the street car. Plaintiff's companion described it as "a big skid." Plaintiff himself testified that from the time he saw the vehicles twenty five feet apart until the instant of the accident, he thought he was "perfectly safe" and "did not see anything in the situation to lead me to think otherwise."

We are of the opinion that the clear preponderance of the evidence proves that the accident happened as described by the motorman; that the pipes on the rear end of the truck were thrown against the side of the street car by the sudden skidding of the rear wheels of the truck. In this view of the case, the accident would have happened whether the street car was moving or standing still. No causative negligence of the motorman was established by the proof.

It was a close question on the facts as to whether or not plaintiff was guilty of contributory negligence. Under such circumstances the jury should have been fully and accurately instructed. Chicago Union Traction Co. v. Miller, 212 Ill. 49.

The court refused defendant's request to give the following instruction:

"The court instructs the jury that it was the duty of the plaintiff to have used his faculties on the occasion in question with such ordinary and reasonable diligence and care as might reasonably be expected of a reasonably prudent person of his age, experience, intelligence and capacity to know danger and to avoid the same, and if you find from the evidence that he failed to do so, and that such failure was negligence which proximately contributed to his injury, then the plaintiff cannot recover against the defendant in this case."

As the plaintiff had testified that he was in one position for some little time before the accident and made no move to protect himself from possible injury, the instruction was relevant and should have been given. Flynn v. Chicago City Ry. Co., 250 Ill. 460; Chicago City Ry. Co. v. O'Donnell, 208 Ill. 267.

The court at plaintiff's request gave the following instruction:

"If you believe and find from the evidence, and under the instruction of the court, that the plaintiff at and just before the time of the happening of the accident in question, exercised that degree of care," etc.

This limited due care of the plaintiff to the time "at and just before the time of the happening of the accident," whereas the jury should have been permitted to consider the care of the plaintiff for his own safety from the time he first took his position on the truck. If this position was a dangerous and negligent one, the fact that he used due care at or just prior to the accident would not relieve him from his negligence in getting into a position of danger. The giving of this instruction was misleading and erroneous. C. & St. R. Ry. Co. v. Dalsey, 133 Ill. 248; North Chicago St. R. Co. v. Cassar, 203 Ill. 608.

It was also error to give, at plaintiff's request, the following instruction:

"The court instructs you that it is immaterial so far as the defendant, Chicago & West Towns Railway, is concerned whether the plaintiff was riding, at the time in question, on the truck in question, with the consent or knowledge of the driver thereof, or without his consent or knowledge."

As to whether plaintiff was a trespasser on the truck was not immaterial, for if plaintiff had not been a trespasser the

motorman might reasonably assume that the driver of the truck would move knowing that the plaintiff was riding on the side of the truck in a position of danger. The motorman had the right to assume that plaintiff was riding with the knowledge of the driver of the truck who would govern his driving accordingly.

For the reason that the verdict finding defendant guilty of negligence is against the clear preponderance of the evidence, and for the errors in rulings upon the instructions as above indicated, the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes the need for transparency and accountability in financial reporting.

2. The second part of the document outlines the various methods and techniques used to collect and analyze data. It includes a detailed description of the experimental procedures and the statistical analysis performed.

3. The third part of the document presents the results of the study. It includes a series of tables and graphs that illustrate the findings of the research. The data shows a clear trend of increasing activity over time.

4. The fourth part of the document discusses the implications of the findings. It suggests that the results have significant implications for the field of study and may lead to further research in this area.

5. The fifth part of the document provides a conclusion and summarizes the key points of the study. It reiterates the importance of accurate record-keeping and the need for ongoing research in this field.

ROSE PIKOWSKY,
 Defendant in Error,
 vs.
 SIMON CHOLEWICKI,
 Plaintiff in Error.

25 PLA. 607

WRIT OF ERROR TO SUPERIOR COURT
 OF COOK COUNTY.

MR. JUSTICE MCCORMY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in trespass against the defendant who was served with summons and whose appearance was entered by his attorneys. To plaintiff's declaration defendant filed a plea of not guilty. The case was called for trial, the defendant not being present. After hearing the evidence the jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at the sum of \$3,000. Defendant by this writ of error seeks the reversal of the judgment thereon.

The only question presented for our determination is the sufficiency of the declaration, defendant availing that it states no cause of action. It was in two counts, the first alleging that the defendant, although not licensed to practice the profession of a physician and contrary to the laws of the State of Illinois, was exercising the profession of a physician and was employed by the plaintiff for a reward to attend and treat her for the cure of a certain sickness or injury from which she was suffering; that defendant accepted such employment and treated her and continued to do so for about four weeks; yet the defendant so unskillfully and negligently conducted himself in that behalf that, by reason of his lack of skill and care, plaintiff's injury was greatly increased and aggravated, causing her unnecessary distress, stress and pain, hindering her from transacting her business and making it necessary for her to pay out divers sums of money to other physicians in endeavoring to be cured of her sickness.

The second count alleged that defendant, contrary to the statute, held himself out as engaged in the diagnosis or treatment of ailments of human beings, and did suggest, recommend and prescribe a form of treatment for the palliation, relief and cure of a certain physical ailment of the plaintiff and accepted compensation therefor; that he did not possess a valid license to practice the treatment of human ailments, but continued such treatment of the plaintiff and so carelessly conducted himself that the physical ailment of the plaintiff became greatly increased and aggravated.

The declaration alleges negligence in general terms, and a demurrer thereto on the ground of uncertainty might well have been sustained. However, the question is not whether the declaration is demurrable but whether, after issue is joined and a verdict is entered, the alleged uncertainty of the declaration is cured. In Brunhill v. Union Traction Co., 239 Ill. 611, the rule is thus stated:

"Had the declaration been challenged by demurrer on the ground that the averment was not sufficiently specific, the objection could have been avoided by an amendment. We think, however, that the objection pointed out is not good after verdict. Objections to the generality of a statement in pleading should have been raised by demurrer, and belong to that class of defects which are cured by verdict."

supported by a number of cited cases.

If the defendant desired a more particular or definite statement from plaintiff, he should have demurred to the declaration. By going to trial he waived the alleged uncertainty and the verdict cured the insufficiency. Under the rule stated, the judgment must be affirmed.

AFFIRMED.

O'Connor, P. J., and Lavelle, J., concur.

FLORENCE ORLANDO,
Defendant in Error,

vs.

JOHN E. STENQUIST,
Plaintiff in Error.

25-14-607-
ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant by this writ of error asks for the reversal of a judgment against him for \$2500, entered upon the verdict of the jury in the trial of an action wherein plaintiff sought to recover damages for personal injuries received by her.

The declaration asserted that, while plaintiff was riding in a motor vehicle in Chicago, the defendant negligently and carelessly operated an automobile so that it ran into and struck the automobile in which plaintiff was riding, inflicting the injuries complained of.

Defendant does not in this court argue the question of liability.

It is said the judgment should be reversed because counsel for plaintiff improperly brought to the attention of the jury the fact that the case was being defended by an insurance company. On direct examination defendant had testified to a conversation he had with plaintiff's husband, undertaking to state what was said. On cross-examination he was asked to state what was further said in the conversation and after relating part he was asked if there was anything else said and replied, "I don't remember." Counsel for plaintiff then asked, "Well, then, to refresh your recollection, you told him that he would have to settle with the insurance company, didn't you? A. I don't remember." Objection to the question and answer was sustained and the answer was stricken out and the jury instructed to disregard it.

Under these circumstances, especially when liability seems to be conceded, we will not hold that the question requires a reversal. Counsel for defendant had developed part of the conversation and under such circumstances the adverse party generally is entitled to the whole of the conversation. That this is the general rule has been repeatedly recognized. Merrill v. Merrill, 187 Ill. App. 589; Morton v. Clark, 253 Ill. 557; Chicago City Ry. Co. v. Bundy, 21 Ill. 39; Morris v. Jonsen, 205 Ill. 87; Phares v. Barber, 61 Ill. 271.

Furthermore, the court promptly struck the question and answer and instructed the jury to disregard them. The objectionable question was not pressed and counsel for plaintiff complied with the ruling of the court. Most of the cases cited by defendant holding that somewhat similar conduct is prejudicial error are cases where it was evident that counsel purposely and insistently attempted to get before the jury the fact that an insurance company was interested in the case.

It is claimed that the verdict of \$2500 is excessive. Plaintiff was thrown against the windshield of the automobile in which she was riding and her head and shoulders went through the windshield. She was cut on the chin, neck, and across the nose; she was jarred and in a dazed condition from hitting the windshield, with a resulting ache in the back of her head; she was taken to the hospital where her wounds were washed and she received treatment. The wounds on her chin and throat were stitched and the glass washed out of her eyes. She received medical attention for a period of about six weeks. Prior to the accident she had been employed as a bookkeeper, receiving \$25 a week. After the accident she remained at home for seven or eight weeks and then attempted to resume her employment but was unable to do so on account of her dazed condition and the pain in the back of her head. She again tried to work

a portion of the time, but was unable to continue and was compelled to stop working. Before the accident she was in perfect health and had no headaches, but she afterwards suffered from headaches and did very little housework. The jury saw the plaintiff and could see the scars on her head and face. Under the circumstances we would not be justified in concluding that the verdict is excessive.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

NORMAN K. ANDERSON,
Defendant in Error,

vs.

WILLIAM W. RICE,
Plaintiff in Error.

ERRATA TO COURT REPORT OF

COURT REPORTER.

MR. JUSTICE McARDLY DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant, William W. Rice, seeks the reversal of a judgment entered against him for \$786.35 upon a hearing in his absence. The plaintiff does not appear in this court.

The suit was originally brought against William W. Rice, Victor LeGros and E. T. Meservey, who were served with summons. LeGros and Meservey appeared and pleaded, but no appearance or plea was filed for Rice. Subsequently plaintiff appeared and suggested the death of "defendant" but did not name the deceased defendant and asked leave to substitute his administrator. No summons was issued against the administrator nor appearance filed by him. The record shows that on June 21, 1923, the cause came on to be heard upon plaintiff's motion to dismiss as to defendants, and suit was dismissed as to defendants LeGros and Meservey, and the cause ordered to proceed against Rice ex parte, resulting in judgment against him.

It was error upon the trial of an action in assumpsit, in the absence of a plea and in the absence of the defendant, to assess the plaintiff's damages and render judgment without entering a default. Lehr v. Vandever, 48 Ill. App. 511; Dickinson v. Sims, 128 Ill. App. 13; Loydig v. Patten, 158 Ill. App. 9; Grubbs v. Green, 36 Ill. 278. The rule is too well established to require further citations.

The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, J. J., and Hatchett, J., concur.

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CHARLES W. STIRFEL,
Appellant,
vs.
HARRY E. JONAS,
Appellee.

25122-007
APPEAL FROM SUPERIOR COURT
OF COCK COUNTY.

MR. JUSTICE McSWEENEY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit seeking to recover \$10,000 alleged to be due from defendant to him by virtue of a special oral contract made about April 10, 1923, wherein defendant agreed to pay plaintiff this sum if plaintiff assisted him in finding a purchaser for the business and assets of the Royal Tea Company, an Illinois corporation in Chicago, of which defendant was president and beneficial owner of the capital stock. Plaintiff's declaration asserted that he accepted the proposition and did assist defendant in finding a purchaser and through plaintiff's efforts the Royal Tea Company was sold June 14, 1923. The case went to trial and the jury returned a verdict against plaintiff. Judgment that plaintiff take nothing was entered, from which he appeals.

The argument presented relates chiefly to the facts, plaintiff contending that the verdict is manifestly against the weight of the evidence. After considering the variant stories, we hold that the jury was justified in returning its verdict adversely to plaintiff.

Plaintiff is an attorney and was a friend of and also acted as attorney for the defendant for fifteen or twenty years prior to April, 1923. There had been negotiations in 1920 and extending into 1921 for the sale of the Royal Tea Company's properties to the Eureka Tea Company, of which Finlay Stewart was president, but these negotiations came to naught and were abandoned. There was a written contract purporting to be between plaintiff and defendant and signed by plaintiff, which covers the compensation to be received

by plaintiff if that proposed sale should be consummated, but it says nothing about any \$10,000 compensation. Plaintiff says that in April, 1923, a new verbal contract was made whereby defendant agreed to pay him \$10,000 as compensation if plaintiff would get the Eureka Tea Company to buy the Royal Tea Company's properties.

The defendant denies this and says that the first time he saw plaintiff in 1923 was in April, when he had plaintiff, acting as his attorney, draw a bill of sale of certain Milwaukee property to Frank J. Lichtner. This sale had no connection with the sale of the business of the Royal Tea Company. Defendant further testified that plaintiff never communicated to him any offer of the Eureka Tea Company in 1923; that he did not ask plaintiff to interest the Eureka Tea Company in the Royal Tea Company's properties, nor to interest himself in selling the Royal Tea Company's business after the failure of the proposed sale of 1921, nor to co-operate with defendant in selling the Royal Tea Company, nor to assist him in finding a purchaser for this property, and never orally requested plaintiff to seek or procure a purchaser for the Royal Tea Company's business or assets at any time in April, 1923. He testified that in June, 1923, he sold the business of the Royal Tea Company to Frank J. Lichtner, who had theretofore bought the Milwaukee business; that he had known Lichtner about twenty years prior to that time; that the subject was first opened by Lichtner at about the time that they were negotiating for the sale of the Milwaukee business; that Lichtner then told defendant he would buy the Royal Tea Company if it was for sale and defendant said it was for sale and that if Lichtner wanted it he could have it; that negotiations looking towards this sale were then made; that Lichtner interested Stewart, president of the Eureka Tea Company, and other parties in the transaction; that the defendant had nothing to do with that phase of the nego-

tiations and did not discuss these other parties with Lichtner. The first that defendant learned that Stewart or the Bureka Tea Company was interested was a few days before the deal was consummated; that Lichtner was the only person to whom defendant talked about the sale, although he was subsequently told that the Bureka Tea Company was going to buy a part of the business from Lichtner. Plaintiff was not present at any of the negotiations which led up to the contract of June 14, 1923, and did not talk to defendant about this sale and never communicated any facts with relation to it to the defendant. Defendant further testified that he never had any contract, written or verbal, with plaintiff to pay him \$10,000 for anything. He advised plaintiff long after the deal was closed that he had sold the business to Lichtner.

From this testimony the jury could properly conclude that plaintiff never at any time promised to pay plaintiff \$10,000, and never after 1921 agreed to pay him anything, and that plaintiff after that time rendered no services of any kind in connection with the sale of the Royal Tea Company's business.

Complaint is made of certain instructions given at defendant's request to the jury. We are inclined to think they might be criticized, especially the 4th instruction. However, in view of the overwhelming weight of his evidence no other verdict could rightly have been returned, we would not be justified in reversing the judgment because of erroneous instructions.

Upon the evidence the verdict was proper and the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

ELIZABETH METCALF,
Appellee,

vs.

ALFRED IRMSCHLER and
MARIE IRMSCHLER,
Appellants.

25734.807

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

MR. JUSTICE MASURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a licensed real estate broker of Chicago, brought suit against defendants to recover commissions for procuring a sale of certain real estate belonging to them, and upon trial by a jury had a verdict. Defendants appeal from the judgment of \$1,000.

In February, 1923, Alfred Irmischer, one of the defendants, listed the real estate in question with the plaintiff for sale at a price of \$36,000. Plaintiff and her salesman, Jensen, became active in the matter and secured and submitted William Hoffman and Jennie Hoffman, his wife, as proposed purchasers. The parties met in negotiation and the price of \$36,000 was agreed upon. There is some variance in the testimony as to the amount of cash to be paid, Alfred Irmischer's version being that the Hoffmans offered \$3,000 cash and he asked for \$10,000. There is believable testimony, however, that Hoffman said he was willing to pay \$10,000 cash. The parties met, but because of the failure of Hoffman's attorney to appear no contract was executed. About a week later Irmischer notified plaintiff's salesman that the deal was off. However, it is not controverted that on April 30th Irmischer and his wife conveyed the property to Harry Chapman for \$36,000, and Chapman upon the same date conveyed the premises to William Hoffman and Jennie Hoffman, the same purchasers who had been secured by plaintiff and presented to the defendants.

It requires no more than the mere statement of the sale to convince anyone that Chapman was not the real purchaser,

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but merely a conduit through which the title passed to the Hoffmans. The case must then be considered as a sale to the parties procured by plaintiff pursuant to listing the property with her for sale.

It is first said that the judgment cannot bind Marie Irmachler, the defendant. She was the joint owner of the property with her husband, and when she joined in the conveyance of the premises she ratified the action of her husband and accepted the benefits of plaintiff's services in procuring the sale.

Defendants assert that plaintiff declared upon an express promise to pay \$1,000 commission, that the same was not proven, and that it was error to allow testimony as to the usual and customary charges fixed by the Chicago Real Estate Board. Plaintiff's declaration not only alleged an express promise to pay \$1,000, but also asserted that the defendants were obligated to pay the rate of commission fixed by the Real Estate Board.

Complaint is made of the instructions given. The one presented in the brief is awkwardly drawn, but it cannot reasonably be said to have misled the jury.

Other points are raised which are not of great importance.

Upon the record we see no reason to disturb the judgment and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

33027

BERNHARD KORNBLITH,
Appellee,

v.

SIDNEY H. STONE CO.,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Defendant was the tenant of the plaintiff, under a written lease, of 4741 Ashland avenue, Chicago, made December 1, 1925, for a term from February 1, 1926, to April 30, 1930. In November, 1927, defendant moved out and plaintiff took judgment by confession for December rent. Subsequently, defendant was allowed to appear and defend. Upon trial the court instructed the jury to find for the plaintiff and judgment was entered on the verdict for \$295, from which defendant appeals.

Defendant claims that, when plaintiff introduced the lease without other evidence, the court should have granted defendant's motion to direct a verdict for it, as the lease alone did not make out a prima facie case of liability. The lease called for rental in monthly instalments in advance on the first day of each month. On and after December 1st it was only necessary to introduce the lease to make a prima facie case of liability for that month's rent. Thompson v. Western Sacket Co., 219 Ill. app. 184. Furthermore, in answer to plaintiff's statement of claim alleging non-payment of December rent, defendant by his affidavit of merits presented the receipt of December 16, 1925, hereinafter referred to.

Defendant sought to show that on December 16, 1925,

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it advanced to plaintiff \$900, which the plaintiff acknowledged receiving with the following receipt:

"Chicago, Ill., December 16, 1925.

S. H. Stone & Co.,
Chicago, Ill.

Gentlemen:

It is understood and agreed that in consideration of your advancing the sum of \$900.00 for rental of the premises occupied by you under the Lease signed by me I will pay you the equivalent of five per cent per annum on the sum of \$900.00 from the time of the commencement of the Lease to February 1st, 1930. This interest to be paid annually.

Very truly yours,
B. Kornblith."

It is argued that it was the duty of plaintiff to apply this \$900 on the first instalments of rent falling due and unpaid. Plaintiff claims, however, he was entitled to keep this \$900 until the lease had expired as security for any possible defaults or damages. The document is inartificially drawn. However, in view of the undertaking by the landlord, as expressed in the agreement, to pay 5% per annum on this \$900 from the commencement of the lease to February 1, 1930, the interest to be paid annually, we hold with the construction contended for by plaintiff. The agreement to pay interest annually negatives any construction involving the application of the principal to the first month that defendant might be in default. It also appears that plaintiff already had \$750 of this \$900 as security on an old lease and that at the date of the signing of the receipt he received \$150, which, added to the previous security of \$750, made \$900. There is little doubt but that it represented a security for the rental and could therefore be retained by plaintiff until the lease had expired. If there had been a default in the last months of the term, defendant doubtless would be entitled to have this amount applied on such default.

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Figure 1. The effect of the concentration of the H_2O_2 solution on the amount of the released H_2O from the H_2O_2 -loaded hydrogel. The amount of the released H_2O was measured by the weight difference of the hydrogel before and after the release. The concentration of the H_2O_2 solution was 0.1, 0.2, 0.3, 0.4, 0.5, 0.6, 0.7, 0.8, 0.9, and 1.0 wt. %.

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Journal of Management Education 30(6)

Defendant claims that the building became in such bad repair as amounted to a constructive eviction. There is some evidence that the floor sunk somewhat when rolls of linoleum were rolled; that there were some cracks in the walls and some plastering fell down. It further appears that plaintiff made some improvements in the building during the first part of the demised term and defendant tried to prevent such improvements and finally through court proceedings got an injunction against him preventing him from finishing the proposed alterations. Pursuant to a telephone message from defendant to the Building Department of the City of Chicago, defendant received a notice November 1, 1927, ordering it to vacate the premises unless the building was repaired and put in a safe condition. Under the terms of the lease the tenant was obligated to repair the premises but, instead of doing so, seems to have procured this notice from the City as an excuse for vacating. The notice itself also called for repairs but defendant preferred to move. Under these circumstances the trial court correctly ruled that a constructive eviction was not established.

Upon the record before us the judgment was proper and is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

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WALTER E. HELLER & COMPANY,
a Corporation,

Appellee,

vs.

LULU E. JONES,

Appellant.

25 JAN. 1938
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment entered by confession on a note executed by defendant. Subsequently, on motion, she was permitted to appear and make a defense and she also filed a claim of set-off. The court instructed the jury to return a verdict in favor of the plaintiff for \$467.14 and to find the issues against the defendant on the claim of set-off. From the judgment entered thereon defendant appeals.

Counsel for defendant, in writing their brief, have so far ignored Rule 19 of this court as to make it extremely difficult for us to determine the precise matters in issue and the points relied on for reversal.

It appears, however, that on May 12, 1927, defendant entered into a conditional sales contract with the Locomobile Company of Illinois, Inc., wherein she agreed to purchase from it for \$2262.24 a new Locomobile automobile. She paid \$690 in cash and agreed to pay the balance in twelve monthly instalments of \$131.02 each, which were evidenced by her note. The contract provided that if the buyer should default in payment of any of these instalments the seller might declare the entire balance due and immediately repossess itself of the automobile, and could either (1) cancel the contract and note as agreed damages for the buyer's breach, retaining all payments theretofore received; or (2) recover from the buyer, as agreed damages, the unpaid balance of the note after allowing credit thereon for the then value of the property

after possession thereof had been retaken or for the net proceeds derived from the sale thereof after deducting costs, expenses and attorneys' fees and rendering the overplus, if any, to the buyer; that public or private sale might be made without notice or publication.

By her affidavit of merits the defendant asserted that, after approximately \$650.10 had been paid on her note, plaintiff took possession of the automobile and that plaintiff did not give defendant credit for any resale of the same, if there was any resale, and that the automobile was reasonably worth at this time \$2,000.

Defendant claims that on October 11, 1927, there was an agreement that, if she would make payments up to date plaintiff would return the automobile to her and have the judgment theretofore entered against her vacated; that she made the payments required, but plaintiff did not keep its promise. The evidence, however, tends to negative defendant's version of this agreement.

The serious point requiring a reversal relates to the value of the car at the time plaintiff took possession of it. Two uncontradicted witnesses testified that it was then worth from \$1900 to \$2,000. Plaintiff testified that it sold the car to William Miller for \$600. The trial court evidently accepted the amount produced by this sale as conclusive as to the amount to be credited defendant. This question should have been left to the jury, for there were circumstances tending to discredit the bona fides of the sale. The witness for the plaintiff testified that it did not attempt to sell the car to anyone else than Miller, and that it happened to sell the car to him because he buys a large number of its used cars. The jury might also consider the fact as to whether a new car purchased in May for over \$2200 was reduced in value by the following November or December to \$600.

After the meeting, the committee members
went to the hotel and stayed there for
the night. The next day, they went to
the office and continued their work.
The committee members were very busy
and had to work late into the night.
They were very tired but they were
determined to finish their work.
The committee members were very hard
working and they were very dedicated
to their work. They were very
committed to their work and they
were very motivated. They were very
determined to finish their work and
they were very hard working. They
were very dedicated to their work and
they were very committed to their work.
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were very dedicated to their work and
they were very committed to their work.

Plaintiff argues that the validity of the sale was not questioned by defendant in her affidavit of merits. She did assert the value of the car to be \$2,000 at the time plaintiff took it, and it appears from the evidence that she did not know there had been a resale until the trial.

The question of the value of the car and the good faith of the sale should have been left to the jury for determination.

The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

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C. G. HARRICK,
Appellee,

vs.

THE BRUNSWICK-BALKE-COLLENDER
CO., Inc., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant's automobile truck collided with plaintiff's automobile. Plaintiff brought suit and upon trial by the court had judgment for \$117.75, from which defendant appeals. The plaintiff does not appear in this court to defend his judgment.

It is claimed that plaintiff did not prove that the accident occurred through the negligence of defendant's driver.

In the forenoon of December 12, 1927, plaintiff drove his automobile and parked it at the east curb of Greenview avenue, about 25 feet north of the intersection of Belmont avenue, and went into the building at that place. He was in the building, at the time of the accident. His son was waiting for him, standing on the sidewalk about 10 feet back of the car, facing south. When plaintiff's son first saw defendant's truck it was coming north on Greenview and was about 15 feet to the rear of plaintiff's car. A Ford coupe was traveling alongside of the truck, on its left. Plaintiff's son said that the Ford coupe tried to pass the truck and as it passed "It looked as though the driver of the truck might have swerved his truck; the truck crashed into the back part of my car, and the Ford coupe went on straight ahead. I did not observe the Ford coupe strike the Brunswick-Balke-Collender truck."

The driver of the truck testified that he had been driving for defendant for 7 years; that he was going north on Greenview, on the right-hand side of the street; that he came to a

complete stop at Belmont avenue and waited for the light to come on; that while he was stationary he saw the Ford coupe behind him as he looked into the mirror. As he crossed Belmont avenue he was going about 8 miles an hour. He said: "This Ford coupe tried to go ahead of me, and he 'cut in' and hit my wheel and knocked me in towards the curb, and I ran into the back end of the Buick (plaintiff's car). His right-hand hind wheel caught my left front wheel. I didn't go over two or three feet after he hit me, before I hit the Buick; I stopped immediately when I hit the Buick. The Ford coupe driver gave no signal that he was going to pass or 'cut in' ahead of me."

After the accident there were some words between the driver of the Ford coupe and the driver of defendant's truck. Defendant's driver testified that the hub-cap of the Ford coupe wheel was knocked off and that the Ford driver said, "I can't help it; I had to get out of the way of that back truck."

From this narrative it is evident that defendant was not operating its truck at an excessive rate of speed or in a negligent manner, but that the injury to plaintiff's car was the result of an accident for which defendant cannot be held liable to respond in damages. It is uncontradicted that defendant's truck swerved into plaintiff's automobile because of the negligent conduct of the driver of the Ford coupe. Whether the Ford coupe actually hit defendant's truck - which the greater weight of the evidence indicates - or suddenly cut in towards defendant's truck, it was the negligent management of this coupe which caused defendant's truck to collide with plaintiff's automobile.

Negligence is the failure to bestow the care and skill which the situation demands. C. N. I. & N. Ry. Co. v. Hazler, 115

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Ill. 525. And if one exercises the degree of care reasonably required of a prudent man, he is not negligent. Rosenthal v. C. & A. R. R. Co., 255 Ill. 552. A case where the facts were very similar to the instant case is Moir v. Hart, 189 Ill. App. 366, where the judgment for the plaintiff was reversed with a finding of fact.

For the reason indicated this judgment is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

O'Connor, P. J., and Ketchett, J., concur.

FINDING OF FACT.

We find that the injury complained of was not occasioned by any negligence on the part of the defendant.

Journal of Interpersonal Violence 26(10) 1978-1997

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L. E. SCHMIDT,
Appellant,

vs.

EDWARD BYRNES and MRS.
GEORGE J. BYRNES,
Appellees.

251-11-108
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McBURNIEY DELIVERED THE OPINION OF THE COURT.

January 10, 1928, plaintiff had a judgment against defendant, Edward J. Byrnes, for \$35. Edward Byrnes did not appear, and service was not had upon the other defendant, Mrs. George J. Byrnes. Subsequently, on July 2, long after the term had gone by, defendant filed a motion to vacate the judgment, which motion was continued to July 9th. This motion was supported by a petition and opposed by a counter-affidavit of plaintiff's attorney. On hearing of the motion on July 9, 1928, the judgment of January 10th was vacated and set aside. Plaintiff appeals from this order. Defendant does not appear in this court.

After the term, at which a judgment is entered, the court has no jurisdiction to vacate the same except by virtue of Section 21 of the Municipal Court act, which confers upon that court the power to vacate its judgment upon grounds that would be sufficient to cause the same to be vacated by a bill in equity.

Defendant's petition presented with his motion alleged the filing of his appearance by his attorney and numerous continuances of the cause and that on November 26, 1926, it was continued generally. On September 22, 1927, an order was entered by Judge Newcomer of the Municipal court setting the case for trial on January 10, 1928. Defendant asserted that neither he nor his attorney was served with any notice for the setting down of this cause for trial.

The counter-affidavit by plaintiff's attorney asserted that the cause was before Judge Newcomer, Room 924, City Hall, pursuant to a general order of the Municipal court of Chicago; that notice was given to all parties that were interested through the Chicago Daily Law Bulletin, an official paper of the Municipal court, and that no further notice was necessary or customary under the practice of the Municipal court; that pursuant to said order the case was called by Judge Newcomer on September 22, 1927, and set for trial for January 10, 1928. The affidavit further alleged that publication of said order was had in the Chicago Daily Law Bulletin, beginning with the last week of August, 1927, and publication of said order was had in said Bulletin until all the cases were called under said order. A certified copy of the order of May 12, 1927, was attached, which is, in substance, that the Clerk of the Municipal court was ordered to prepare calendars of the cases which were started before April 1, 1927, and which were continued generally; that it was further ordered that the fourth class cases should be called for trial in Room 924, City Hall, on September 12, 1927, and be set for trial.

The petition shows no ground on which a court of equity would vacate the judgment. Under the order of May 12, 1927, this case was on the calendar made up by the clerk and it was duly called in room 924 before Judge Newcomer and set down for trial for January 10, 1928. Defendant's counsel by reference to the Law Bulletin and in other ways should have noted the preparation of this special calendar.

It has been held that failure to notice the publication of cases designated for trial in the Law bulletin is negligence on the part of the attorney. Loew v. Krausoe, 32 Ill. 244. By the exercise of reasonable care defendant's counsel would have known of the calling of this calendar. Relief will be barred where

the attorney has been guilty of negligence or want of diligence as such negligence is binding on the principal. Inhris v. Bear, 230 Ill. App. 158, and cases cited there.

Furthermore, defendant's petition does not show any grounds for failure to make his motion to vacate the judgment within the term time. His petition asserts that he first knew of the judgment when he was informed "of said judgment by the Chicago Title & Trust Company." This may have been within the term time, in which case his failure to act until nearly six months thereafter was negligence.

The order of July 9, 1923, vacating the judgment of January 10, 1923, is reversed.

REVEREND,

O'Connor, B. J., and Batchatt, J., concur.

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RAILEY SANKLOW,
Appellee,

vs.

EARL W. THOMPSON,
Appellant.

254-A. 008⁵
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment against him for \$2100 entered upon the verdict of the jury in an action brought by plaintiff, an attorney, to recover an amount claimed to have been promised to him as fees for services rendered.

The controversy, which was the background of plaintiff's claim, was between Edwin P. Juneman and defendant Thompson over a division between them of the capital stock of the National Gut String Manufacturing Company. These men had been in partnership, which was incorporated with the understanding, as Thompson says, that each was to have an equal interest in the corporation, but that, unknown to him, Juneman had acquired fifty-one shares of stock, leaving Thompson forty-nine shares, which gave Juneman control. After the corporation had existed for about two years Thompson was discharged from the employment of the company. Believing he was entitled to the additional one share of stock which would give him an equal voice with Juneman in the management of the corporation, Thompson consulted and employed plaintiff to act as his attorney. Defendant paid plaintiff fees aggregating \$500, but plaintiff claims that defendant agreed to pay him ten per cent of any amount offered by Juneman to defendant for the latter's stock and accepted by defendant. Plaintiff sought ^{by} evidence to show that defendant received an offer from Juneman of \$21,000 for his stock which he said he would accept but afterwards

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refused. No sale was made. Plaintiff testified to this effect, and there was testimony of two other witnesses which, it is claimed, tends to support plaintiff's version. It cannot be said, however, that these witnesses were disinterested.

On the contrary, defendant's version is that his objective was to secure the one share of stock ^{of} which he claimed he had been defrauded by Juneman, and that it was for this purpose he employed plaintiff as his attorney, and not for the purpose of selling the shares of stock he already owned. He testified that he wished plaintiff to bring suit to recover the one share of stock that belonged to him rightfully, to which plaintiff agreed and in answer to an inquiry told defendant that the retainer fee would be \$500, and defendant paid him \$20 on account; that at this time nothing was said with regard to any fee based on a percentage; that subsequently plaintiff reported that he had a talk with the attorney for Juneman and the company and it was proposed that they should get together, but defendant replied that he was not interested in selling or buying, that his only thought was to obtain this one share of stock and stay in the business in which he had been all his life; that plaintiff was urging defendant all the time to see what Juneman would offer; that a proposition to buy out defendant for \$21,000 was made and plaintiff urged defendant to accept this; that at that time plaintiff told him that the regular broker's fee on this would be fifteen per cent but that he would do it for ten per cent; that defendant told him that he never knew there would be any commission, that he had supposed that the other fee he had already paid would take care of this; that he was not able to pay this fee and would rather sit by and go ahead with the suit to regain the one share of stock. There was much further talk.

Plaintiff introduced evidence tending to show that when the parties met he said, in the presence of defendant, that the

offer of \$21,000 would be accepted. Certain papers were drawn by Juneman's attorney purporting to express the agreement of the parties, and delivered to plaintiff. Defendant, however, refused to sign these and informed plaintiff that he was still of the same mind - that he did not wish to sell out but wished to bring suit for the one share of stock, that the business was making progress, that the financial report of the auditor showed the net worth was about \$58,000 and that he could see a future in it and did not want to get out. Defendant categorically denied that he agreed to pay plaintiff ten per cent of any amount offered for his stock, and denied that he accepted any offer to sell the same. He subsequently brought suit by other counsel for the recovery of the one share of stock, which suit is still pending.

We are not content to permit this judgment to stand. At the time of the alleged promise to pay the relationship of attorney and client existed between the parties. Under such circumstances, it is incumbent upon the plaintiff to prove beyond suspicion that the arrangement between them is fair and equitable. The law watches with unusual jealousy over all transactions between attorneys and clients. The client is at a great disadvantage in contracting with his attorney. He must rely not only upon his own judgment, but upon the judgment and statements of his attorney and usually is unable to judge as to the value of his attorney's services. As was said by Story in his work on Equity Jurisprudence, 14th ed., sec. 433:

"The situation of an attorney or solicitor puts it in his power to avail himself, not only of the necessities of his client but of his good nature, liberality and credulity to obtain undue advantages, bargains and gratuities. Hence, the law, with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void which between other persons would be held unobjectionable."

In Elmore v. Johnson, 143 Ill. 513, is an extended discussion of the relationship between attorney and client, where it is said that the relationship is one of confidence and that transactions between attorney and client are often declared to be voidable which would be held unobjectionable between other parties, and that the law is thus strict "not so much on account of hardship in the particular case as for the sake of preventing what might otherwise become a public mischief." To the same effect are Ringen v. Ranes, 263 Ill. 11; Bolle v. Read, 138 Ill. App. 153.

With these principles in mind we hold that the plaintiff failed to establish either the alleged promise by defendant to pay plaintiff the amount claimed by him or the acceptance by defendant of the offer from Juneman which was a condition of defendant's obligation.

Defendant claims it was error to permit in evidence a copy of the proposed agreement between Juneman and Thompson. It would have been sufficient to have shown that a writing was made and submitted but not signed. The introduction of the writing itself was unnecessary and improper as tending to mislead the jury into believing that it contained the terms upon which the parties had actually agreed. For the same reason the introduction of plaintiff's Exhibit 1, a carbon copy of the proposed contract, was objectionable.

The trial court properly sustained the objection to the question as to the experience of the plaintiff in recovering shares of stock for clients. Defendant testified that he employed plaintiff for this purpose, so that plaintiff's experience in this particular kind of work was immaterial.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Hatchett, J., concur.

1. General Information

The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of California.

The total area of land owned by the United States in California is approximately 100,000,000 acres. This land is divided into several categories, including:

- Public Domain Land
- Land Reserved for the United States
- Land Reserved for the States
- Land Reserved for the Indians
- Land Reserved for the Reclamation Service
- Land Reserved for the National Forest Service
- Land Reserved for the National Park Service
- Land Reserved for the National Monument Service
- Land Reserved for the National Historic Landmarks Service
- Land Reserved for the National Antiquities Service
- Land Reserved for the National Conservation Service
- Land Reserved for the National Wildlife Service
- Land Reserved for the National Fish and Wildlife Service
- Land Reserved for the National Marine Service
- Land Reserved for the National Ocean Service
- Land Reserved for the National Aeronautics and Space Service
- Land Reserved for the National Atomic Energy Service
- Land Reserved for the National Health Service
- Land Reserved for the National Education Service
- Land Reserved for the National Science Service
- Land Reserved for the National Social Security Service
- Land Reserved for the National Labor Service
- Land Reserved for the National Transportation Service
- Land Reserved for the National Communication Service
- Land Reserved for the National Information Service
- Land Reserved for the National Defense Service
- Land Reserved for the National Security Service
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- Land Reserved for the National Planning Service
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- Land Reserved for the National Research Service
- Land Reserved for the National Development Service
- Land Reserved for the National Planning Service
- Land Reserved for the National Construction Service

Benedek
 SAM B. BENEDEK,

Appellee,

vs.

RUTHIE W. CHRISTESEN,
 Appellant.

3/ 251 I.A. 609

COURT FROM SUPERIOR COURT
 OF COOK COUNTY.

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant order from a decree entered in favor of the complainant in a suit to foreclose a mechanic's lien.

The cause was heard by the chancellor upon exceptions of the defendant to a report of the master. These exceptions were over-ruled and a decree was entered finding a lien for \$790.39 and ordering foreclosure and sale in case of the failure of defendant to pay.

The evidence shows that complainant was a mason contractor and that the defendant was the owner of the property involved which was improved by a one-story brick store building and occupied by her. A Mrs. Sroczak owned the premises adjoining defendant on the north, which was about to be improved, and defendant thereupon engaged the complainant to do the work necessary to protect her wall while the improvement on the adjoining premises was being made. Thereafter, while the work was in progress the defendant further employed complainant to brick up a wooden doorway on the north front of her building, and it is for these two items (namely, the work done in protecting the wall and bricking up the doorway) for which the claim for lien was made by complainant and allowed by the court.

The defense set up in the answer is that through the fault and negligence of complainant no proper foundation was put under defendant's building and that through the fault of complainant defendant's property has been damaged more than the value of

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all the services rendered by the complainant.

It is urged, as matters of law, that no lien should have been allowed because the work done was not a benefit to the property and the work was not completed; hence no lien could attach; that the burden of proof is on the complainant and that complainant is liable for damages sustained through his work having been performed in a careless and negligent manner.

That such are the general rules of law may be conceded, but it is apparent that the applicability of these rules of law depends upon the facts appearing in the case. The master found the facts against the defendant, and the chancellor approved the findings of the master. In this state of the record, the question for this court is whether the findings are clearly and manifestly against the weight of the evidence. Treloar v. Hamilton, 225 Ill. 102; Smith v. Thomas Elevator Co., 276 Ill. 328; Stanley v. Stanley, 146 Ill. App. 109; and Leyer v. Levy, 249 Ill. App. 403. This rule, which is binding upon this court, defendant does not seem to recognize in brief or argument, and after listening to oral argument and carefully considering the evidence, we find it impossible for us to say (evading this rule) that the finding of the master as approved by the chancellor should be reversed.

It is established by the evidence that while the work was being done the building of defendant fell; that the complainant thereupon employed a housemover who raised up the wall, and that complainant then put in supporting piers, after which the jacks were removed. We think, too, it is established, not only by the evidence produced by complainant but also by the evidence of witnesses for the defendant, that defendant's building had been erected on so old foundation which was not examined before the building was put thereon; that for an uncertain length of time the old foundation had been exposed to the elements after the original

building was destroyed by fire, and that the falling of the defendant's building was due to the crumbling of the old foundation rather than to any negligence of the complainant in doing his work.

Much feeling is disclosed in the testimony of the witnesses, and there is a direct conflict on material facts of the controversy. Under such circumstances a reviewing court must depend very much upon the finding of the master and not only heard the witnesses in person, but that finding has been approved by the chancellor. It is true, as defendant points out, she produced the larger number of witnesses; but it has often been said by this and other courts that testimony is to be weighed and not counted. We will also add that an important exhibit does not appear to be contained in the record.

For the reasons indicated, the decree is affirmed.

AFFIRMED.

O'Connor, S. J., and McCreely, J., concur.

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JOSEPH SIMON WISE,
Appellant,

vs.

HARRY FLORENCE and
GEORGE LOMAX,
Appellees.

251 L.A. 009

APPEAL FROM HUNY COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the plaintiff from a judgment entered in favor of the defendants upon the finding of the court. The statement of claim discloses suit by plaintiff against defendants for the alleged conversion of a bond which, with coupons annexed thereto, is alleged to be of the total value of \$1085.

The defense set up in the affidavit of merits is that the bond was delivered to defendants as collateral security for the performance of covenants and conditions of a certain lease, which covenants and conditions have not been performed.

The evidence discloses that on May 23, 1926, the defendants entered into a written agreement with one Anna White whereby they demise to her the storeroom known as the Harigold Coffee Shop at 801 Grace street in Chicago, to be occupied as a coffee shop. The lessors agreed that the fixtures then in the premises should remain for the use of the lessee, a list of which fixtures is attached to the agreement and made a part of it. The lessee agreed to pay \$150 a month in advance on the 25th day of each and every month and in addition thereto a sum equal to eight per cent on the gross sales of candy, cigars, cigarettes and base goods and fifteen per cent on the gross sales of soda fountain products, sandwiches, lunches, and all other products sold by her, the amount ^{due} to be computed on the last day of each month, beginning on May 31, 1926.

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As a part of this agreement the lessee promised to have plaintiff deposit with the lessors, "as security for the carrying out by the party of the second part of all of the covenants herein contained," the one thousand dollar bond here in controversy; the agreement further stating: "which said bond and coupons are to be returned by said first parties to the said Joseph S. Wise at the conclusion of this lease, provided the fixtures herein listed are returned in as good a condition as received, reasonable wear and tear excepted, and provided that all of the covenants herein contained have been on her part fully performed, the parties of the first part hereby agree to pay to the party of the second part the sum of 6% per annum while said money is in their possession, payable semi-annually." The lease also provided:

"The parties of the first part will cause the floors and windows in the demise premises to be cleaned at such times as they deem necessary, at their own expense, but any and all loss, theft or damage caused by the employees during such cleaning or while such cleaning is in progress shall be borne by the parties of the second part."

The lease also provided that the lessors would "furnish steam and hot water to the party of the second part in said room during all the time that the power plant of the first parties is in operation, and in any event to furnish/said second party hot water and steam from October first to May first of each year." The lease by its terms would not expire until April 30, 1928.

The lessee went into possession of the premises a day or two after the execution and delivery of this lease. On October 4, 1927, the lessee authorized her attorney to take steps necessary to cancel the lease and to recover the bond. On the same day Anna White gave written notice to the defendants which recited the execution of this lease and the agreement with reference to steam and hot water, stating that since lessors had "failed and refused to furnish the undersigned the steam and hot water on October 1st, 1927, and on days subsequent thereto," and had defaulted in the

performance of other conditions, she elected to and declared the lease terminated and surrendered possession of the premises. Thereafter Anna White moved out of the premises, refused to pay rent, and made demand for the return of the bond, which was refused.

The controlling question in the case is whether the lessee had a right to terminate the lease under its terms and provisions, as she attempted to do; and while other questions are raised and argued we prefer to rest the decision of the case upon the answer to that question. The plaintiff undertook to show that for a long time after the lessee took possession defendants caused the windows to be cleaned on the inside and outside three times a week and that in the months of August and September, 1927, defendants caused these windows to be cleaned only once a month; that whereas, prior to that time defendants cleaned the floors of the premises at least once a day, during this time they caused the floors of the premises to be cleaned not oftener than once a week. This evidence was excluded by the court, and we think properly so for two reasons. In the first place, the written provision of the lease is to the effect that the premises should be cleaned "at such times as they deem necessary," "they" meaning the lessors. There is no ambiguity in this provision of the agreement, and there is no offer to prove that the lessors did not clean the premises at any time when they may have deemed it necessary. This unambiguous provision of the lease could not be varied by parole testimony, but, in the second place, the lessee being in possession, we think it cannot be said that the failure of the lessors to clean could be regarded as an eviction, either actual or constructive, which would justify the abandonment of the premises. If the lessors were obligated to clean and failed to do so, the tenant in possession could have had the cleaning done and recovered therefor either by a separate suit or by way of recoupment.

With reference to the alleged failure of the lessors to furnish heat from October 1st to October 5th, which the written notice indicates was the alleged default upon which the lessee relied to justify the cancellation of the lease, Mrs. White testified that it was not cold the first few days of October but there was no hot water and "we had to heat our own." She said that from May until October she heated water on a gas range; that the hot water heater referred to in the inventory was there all the time but that they had to heat the water themselves; that they used the heater and that it was understood that the water was to be heated on it during the summer with their own gas. She said, "We used the heater through the summer of 1926, but from May to October 5, 1927, I just heated it on the kitchen stove. The heater was still there and in good shape, as far as I know."

Joseph H. White, the husband of the lessee, testified: "We had no heat from the 1st to the 13th of October, 1926, and I went to Mr. Florence and he said he would see about it. In the meantime, I told him I would have to pay \$12 or \$13 more on the gas bill, which he said he would pay but he never did. We didn't get any heat or hot water at all between October 1st and October 4th, 1927." This witness further said that on October 4th he talked with Mr. Florence, who told him that he had just written a letter apologizing for not having hot water or heat, saying "the old man is not here and he left word not to furnish any heat or hot water until it gets very cold." The witness told him that that was not the understanding, and Florence said, "You are perfectly right; I was just writing you a letter in regard to that, but I left it on my desk." This witness further said that Florence promised he would supply heat and hot water when it would get very cold.

The plaintiff contends that the failure of a landlord to furnish heat in accordance with the provision of a lease constitutes a constructive eviction, which justifies the tenant in moving

The first part of the report deals with the general situation of the country. It is a very interesting and informative study of the country's development. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country.

The second part of the report deals with the economic situation. It is a very detailed and thorough study of the country's economy. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's economy.

The third part of the report deals with the social situation. It is a very detailed and thorough study of the country's social conditions. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's social conditions.

The fourth part of the report deals with the political situation. It is a very detailed and thorough study of the country's political conditions. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's political conditions.

The fifth part of the report deals with the cultural situation. It is a very detailed and thorough study of the country's cultural conditions. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's cultural conditions.

The sixth part of the report deals with the environmental situation. It is a very detailed and thorough study of the country's environmental conditions. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's environmental conditions.

The seventh part of the report deals with the international situation. It is a very detailed and thorough study of the country's international relations. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's international relations.

The eighth part of the report deals with the future of the country. It is a very detailed and thorough study of the country's future prospects. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's future prospects.

The ninth part of the report deals with the conclusion. It is a very detailed and thorough study of the country's overall situation. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's overall situation.

The tenth part of the report deals with the appendix. It is a very detailed and thorough study of the country's additional information. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's additional information.

from the premises and if he moves releases him from the payment of rent thereafter accruing, citing in support of this contention Lawler v. McManara, 203 Ill. App. 285, Thompson v. Weinermann, 207 Ill. App. 110, and Morgan v. Vierling, 211 Ill. App. 317.

In Lawler v. McManara, *supra*, we said:

"It is now the well settled law that failure of a landlord to furnish heat in an apartment in accordance with the terms of the lease amounts to a constructive eviction, which justifies the tenant in abandoning the premises."

In that opinion we quoted with approval and adopted the expression of the Supreme Court of the State of New York in Bernard Realty Co. v. Bonfit, 155 N. Y. App. Div. 132, 139 N.Y.S. 1050, which pointed out the reason for the rule, namely, that people who lived in tenement houses, apartment houses and apartment hotels could have control only of the inside of their own limited demised premises, and that conditions unknown to the ancient common law had been thus created. We are disposed to adhere to the rule there announced for the reasons stated.

It is not, however, every failure to furnish heat precisely as provided in the terms of a lease which can be held to be a constructive eviction. Such a rule would be arbitrary and unreasonable. The theory upon which an eviction is held to justify a refusal to pay rent is that the landlord is guilty of some act which manifests his intention that the tenant shall no longer enjoy the possession of the premises. There is no proof in the record here that heat was actually needed between the first and fourth days of October; indeed, the furnishing of heat under some degrees of temperature might amount to an eviction. It is impossible to read the record here without the conviction that the complaint about lack of heat was not the motive which caused the lessee to move from the premises; moreover, the lease was not of an apartment.

The proof is wholly insufficient to establish either

From the evidence presented, it is the opinion of the Board that the applicant is not a person of good moral character, and is therefore not qualified for admission to the United States. The Board's decision is based on the fact that the applicant has been convicted of a crime involving moral turpitude, and has not demonstrated sufficient rehabilitation to warrant a finding of good moral character.

an actual or a constructive eviction. The attempt to rescind the lease was therefore not justified, and since the lessee has refused to fulfill the covenant for the payment of rent the owner of the bond is not entitled to the return of his security until such covenant is complied with. Lessors were therefore justified in refusing to deliver up the bond and there was no conversion.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and McQuirely, J., concur.

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 fact that the system is
 not self-sufficient. It
 requires a constant supply
 of raw materials and
 energy. This is a major
 problem for the system
 as a whole. The second
 problem is the fact that
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 requires a constant
 supply of information
 and feedback. This is
 a major problem for
 the system as a whole.

The third problem is the fact that the system is not
 self-organizing. It requires a constant supply of
 information and feedback. This is a major problem
 for the system as a whole.

HERMAN KINSKIBACH,
Defendant in Error,

v.

SARAH ROSENBERG and
LOUIS ROSENBERG,
Plaintiffs in Error.

ERROR TO CIRCUIT
COURT, COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error were defendants in the trial court and seek by this writ to reverse a decree in favor of the complainant upon a bill to foreclose an alleged mechanic's lien against certain premises owned by them.

The decree found a lien to the amount of \$350 and directed the foreclosure and sale of the premises upon failure of defendants to pay. The cause was heard by the chancellor upon an amended bill and the answer of defendants thereto.

It is contended in the first place that the court erred in overruling a demurrer interposed by defendants prior to the filing of their answer. If the court erred in this respect, defendants waived the same by answering. Gies v. Hanford, 212 Ill. 261; Kesner v. Miesch, 204 Ill. 320; Fitzkee v. Hoeflin, 187 Ill. app. 514.

The bill alleged that the premises were registered under the Torren's Act, and the defendants urge that the complainant failed to disclose proof of notice as required by section 92 of that act (see Smith-Hurd's Ill. Rev. Stat. 1927, chap. 30, p. 676). The suit in this case is brought by the contractor against the

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owner and was begun within the time limited by the statute. The purpose of notice in such cases is to protect third parties and notice is immaterial in a suit brought by the contractor against the owner within the time fixed by the statute. Hacken v. Isenberg, 283 Ill. 539; Chicago & River Lumber Co. v. Vellenga, 305 Ill. 415; Zander Reum Co. v. Congregation B'Nei Moshe, 159 Ill. App. 371; Smith v. McLaughlin, 189 Ill. App. 529.

One of the items allowed was for extra work for raising the basement of a building, and for this work a paper, which purports to be a promissory note in the sum of \$155, was given the complainant. The supposed note is signed "Sarah Rosenberg, per Rosenberg." It is not dated but promises to pay the sum named within five months. The alleged note was not paid, and the attorney for the complainant on the trial offered to return it. Defendants contend that the delivery of this paper amounted to payment and cite Hoodless v. Reid, 112 Ill. 105. The authority, however, does not sustain the contention, and we think it is without substantial merit.

It is also urged that the work was not completed and that there was no certificate from the architect. As to the completion of the work, the evidence is conflicting. There was evidence tending to show that supervision by the architect was waived.

It is not argued that the decree is against the manifest weight of the evidence. The abstract does not comply with the rules of this court in material respects, and we will not search the record to reverse.

For the reasons indicated the decree is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

WLADYSLAW SOKOLOWSKI and JOHN
MARCINKOWSKI, as Individuals and
Doing Business as the Perfection
Parlor Furniture Co.,
Appellants,

vs.

BOLESŁAW SOKOLOWSKI and CHESTER
SOKOLOWSKI,
Appellees.

254-9-0097
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainants from a decree which dismissed their bill for want of equity.

The bill was filed May 7, 1927, and alleged that Wladyslaw Sokolowski and John Marcinkowski were engaged in the business of selling parlor furniture at wholesale and retail under the name of Perfection Parlor Furniture Company at Chicago, Illinois; that on December 27, 1925, complainants entered into a written contract with the defendants, whereby complainants purchased from defendants for \$36,000 and the conveyance of certain lands, all their right, title and interest in and to the partnership business known as the Perfection Parlor Furniture Company, together with the good will incident thereto.

As a further consideration for the covenants to be performed by complainants and the payment of the purchase price, defendants for themselves, their heirs, executors, administrators and assigns agreed jointly and severally to and with the complainants that "for the space of five (5) years immediately succeeding the execution of this agreement they will not within a radius of twenty-four (24) city blocks from the present site of the land and building wherein the business of said Perfection Parlor Furniture Company is now transacted and conducted, either directly or indirectly, engage in, conduct, maintain, manage, control, or

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operate any business competing or interfering with the business now conducted by the said Perfection Parlor Furniture Company and that they will not jointly or severally within the State of Illinois, directly or indirectly, either for themselves or any other person, firm or corporation, call upon, solicit, divert or take away or attempt to solicit, divert, or take away any of the customers, business or patronage of the said Perfection Parlor Furniture Company; and it is specifically understood and agreed that this covenant on the part of the said parties of the first part is a specific inducement and further consideration for the payment to the said parties of the first part of the purchase price hereinafore mentioned."

The bill alleged the violation on the part of defendants of this covenant in restriction of trade and prayed for an injunction restraining defendants from such violation. Upon the filing of the bill a temporary injunction issued and thereafter the defendants filed a joint and several answer in which they denied that complainants were engaged in the business of retail parlor furniture business as set forth in the bill of complaint, but averred that they were engaged in the wholesale trade only; that the defendants were engaged in the retail business and therefore were not interfering with the complainants in the wholesale business.

The cause was put at issue and the chancellor, after hearing the evidence submitted by the respective parties, announced that he would enter a decree in favor of the complainants and directed counsel to prepare such a decree.

Thereafter, defendants filed a petition in which they set up that since the last proceedings were had petitioners learned that complainants had incorporated as a corporation and were doing business as the Perfect Parlor Furniture Company, Inc. The petition asked leave to produce evidence that complainants had incorporated as a corporation on April 2, 1927, and asked that the bill be

dismissed.

Complainants answered this petition, stating that they had applied for a charter for a corporation on April 2, 1927; that the corporation charter was issued to the Perfect Parlor Furniture Company, Inc., and that said charter was recorded; that they had never issued any stock nor subscribed for any stock except as in their first application; that there was never a meeting of the stockholders; that notice was never given to any of the creditors; that officers were never elected, money never deposited under the name of Perfect Parlor Furniture Company, Inc., and that merchandise was neither ordered nor sold under its name up to and including November 1, 1927.

The court heard the evidence submitted by the parties and filed a written opinion reciting the facts as he found them and the reasons for which he was constrained to dismiss the bill of complainants.

It appears therefrom that on March 23, 1927, the complainants executed under oath a statement of incorporation for the purpose of forming a corporation to be known as Perfect Parlor Furniture Company, Inc. This statement recited that all of the capital stock had been subscribed and paid for with cash and the property which was conceded to be the same property and business formerly owned and conducted by Marciniowski and Sakolowski as co-partners; that directors were named and all the legal requirements complied with; that on April 2, 1927, the Secretary of State issued its certificate and certified that the ^{Perfect} Parlor Furniture Company, Inc., was a legally organized corporation under the laws of the State of Illinois; that this certificate was on April 7, 1927, duly filed for record in the office of the Recorder of Deeds of Cook county.

The court stated that the Perfect Parlor Furniture Company, Inc., thus came into full being as a de jure corporation;

that the three directors named in the certificate of incorporation were by statute expressly authorized to hold office until the first annual meeting of the stockholders; that the right to maintain the action could not be both in the partnership and the corporation at the same time; that it must be conceded that on the very day the certificate of incorporation was filed for record with the recorder of deeds the corporation had the right to commence to do business. The court was of the opinion that it would necessarily follow that if it had fully succeeded to the rights of the co-partners to transact the business in question it had at the same time and to the same extent succeeded to the exclusive right to institute and maintain this action. The court in fact found the corporation was at that time doing business as such. It further appears that the complainants stated under oath to the Secretary of State that all of the property owned by them as co-partners, including good will, had been turned over in payment of the capital stock of the corporation; that they had made this sworn statement for the purpose of inducing the Secretary of State to issue his certificate of incorporation. The court held that when the corporation came into de jure being the complainants, in view of the statements made by them, would be estopped to assert that their statement of incorporation was false, and that they had retained all the property and rights which under oath they stated had been used to pay for the capital stock of the corporation.

A motion was made by the complainants for leave to amend their bill by making the corporation a party complainant, but this motion was denied and the decree entered.

It is argued by complainants that the court erred in denying them leave to amend the bill and in entering the decree dismissing the bill. Authorities are cited by complainants to the points that the exercise of corporate right presupposes a previous

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organization, and that without such organization an association can do no corporate act and is but a mere naked body; that a private charter is a mere offer which is revocable by the state; that the primary franchise of a corporation is nothing more than the right or privilege of being a corporation; that the payment of stock is a condition precedent to becoming a legal corporation in Illinois, and that a corporation can surrender its certificate of incorporation before user.

Interesting as these points are, to think a consideration of them quite unnecessary to a decision of this case, since it clearly appears that the stockholders of the supposed corporation and the complainant owners of the partnership are practically identical. We can see no basis for an estoppel insofar as these defendants are concerned. Their covenant in restriction of their right to trade was assignable, (Diedrich v. People, 37 Ill. App. 604; 141 Ill. 665) irrespective of the fact that the writing failed to state that it was binding upon the assignees of complainants. In substance, therefore, assuming the organization and existence of the corporation and that the contract in question had been transferred to the same, its rights and those of the complainants copartners are identical. Equity has respect to the substance and not the form, and it makes no difference so far as the defendants are concerned whether the complainant is a partnership with whom they covenanted or a corporation to whom their covenant has been assigned. This court is committed to the doctrine that where a corporation is organized to take over and continue a business theretofore conducted by an individual and such individual conveys to the corporation all the assets of the business in exchange for stock in the corporation, the corporation is liable to pre-existing creditors of such individual for the amount of his indebtedness to them. Acorn Lumber Co. v. Friedlander Box

Co., 240 Ill. App. 425; Chicago Smelting & Refining Corp. v. Sullivan, 246 Ill. App. 538.

To hold that a corporation which succeeded to the rights and properties of a partnership might not maintain a suit based upon a contract made between third parties and the partnership from which it purchased, would be as unreasonable as to say that a complainant could not maintain his suit in court if he put on a new coat while the suit was pending. Andres v. Morgan, 62 Ohio St. 236.

We think the court erred in Halsheim, the bill and abused its discretion in refusing to permit an amendment by which the corporation might have been joined as a party complainant.

For the reasons indicated the decree is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Scurely, J., concur.

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32911

HOMER H. SCHNEIDER,
Defendant in Error,

v.

JAY P. BLISS, MARGARET
DEVENEAU BLISS, RAYMOND MOORE,
ROBERT E. CROWE, State's Attorney,
and CHICAGO TITLE & TRUST COMPANY,
as Trustees,
Plaintiffs in Error.

ERROR TO CIRCUIT

COURT, COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Schneider, the holder of notes secured by trust deed, filed a bill to foreclose, naming as defendants Margaret D. Bliss and Jay P. Bliss, owners of the equity of redemption, Robert E. Crowe, who claimed some interest, and the Chicago Title and Trust Company, as trustee, named in the trust deed sought to be foreclosed, as well as the trustee named in a second mortgage trust deed.

Raymond Moore entered his appearance and filed an answer in which he described himself as the owner of the notes secured by the second mortgage trust deed.

The cause was put at issue and referred to a master who reported that the equities were with the complainant; that Raymond Moore was the owner of the indebtedness secured by the second trust deed and by reason thereof had a lien upon the premises subject only to the lien of the complainant. The decree directed in substance that the amount found due to Schneider should be paid from the proceeds of the sale and the remainder applied to the payment of the amount found due to Raymond Moore as the holder of the second mortgage.

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The master sold the premises for a sum insufficient to pay the full amount due complainant and reported a deficiency of \$201.91. This report of sale was confirmed, and the court entered judgment in favor of complainant against Jay P. Bliss and Margaret D. Bliss for said amount. The decree found that there was a deficiency of \$3689.49 with interest due to the defendant Raymond Moore from Jay P. Bliss and Margaret D. Bliss, entered judgment therefor and directed that execution should issue therefor.

To reverse this judgment, Jay P. Bliss and Margaret L. Bliss have sued out this writ of error.

It is well settled that in the absence of a crossbill a court of equity may not grant affirmative relief to a defendant. That affirmative relief may not be granted upon an answer has sometimes been held even where the answer prayed it might be considered as a cross-bill. Furdy v. Henslee, 97 Ill. 389; Powell v. Carr, 100 Ill. App. 105; Ruprecht v. Henrici, 113 Ill. pp. 398; and Leggers v. Adler, 248 Ill. pp. 118. It is unnecessary to repeat here what is said in those opinions.

For the reasons indicated that part of the decree which awards a judgment to Raymond Moore and adjudges that the rents shall be appropriated to the satisfaction thereof will be reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

PRICE REALTY SECURITIES CO., a
Corporation,

Appellant,

vs.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

ELEANORA DROPINSKI,
Appellee.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued alleging that defendant employed it to secure a person who would make a loan in the sum of \$15,000 on certain property owned by defendant; that plaintiff obtained such loan for defendant on September 14, 1926; that defendant had agreed to pay a commission of five per cent on the amount of the loan, but had refused to do so.

The defendant filed an affidavit of merits in which she denied that plaintiff secured a loan as agreed, but on the contrary she averred that plaintiff was unable and refused to make the loan for her on the premises in question and denied that plaintiff ever placed itself in a position of being able to make the loan.

There was a trial by the court, and at the conclusion of the evidence the court found the issues against the plaintiff and entered judgment on the finding.

The plaintiff contends that it produced a person ready, able and willing to make the loan as requested by defendant; that the judgment of the court below is manifestly and palpably against the weight of the evidence, and that it should therefore be reversed.

The only evidence in the record tending to show that plaintiff produced a party able and willing to make the loan was that given by one Lampadius, a professor of languages. His testimony was to the effect that he saw the application for the loan but

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and went
 did not go out to look at the property. On direct examination he said that he had \$15,000 with which to make the loan and was ready and willing to make it but did not do so because "it never came to a head." On cross-examination he stated that he had this \$15,000 in a bank in Oklahoma City but he did not at the time of the trial have any bank account there. He further said that the account did not stand in his name; that he sold farms in Oklahoma in which he was interested with his partner and had some money "we wanted to invest in Chicago. The money was in the name of Professor Sturgis; he is at Normal, Oklahoma, and that was the fund we expected to use in making this loan. That fund in the bank in Oklahoma was in excess of \$15,000. Part of it was mine, and part of it would have to be obtained from Professor Sturgis. Yes, that money was under my complete control. That means that I could draw a check on the bank in Oklahoma on that fund at that time and get it in here. No, I wouldn't sign the professor's name. I would have to get Professor Sturgis to sign the check to get the money from the account and Professor Sturgis couldn't refuse." Whereupon Mr. Harris, attorney for defendant, asked the witness: "I say if he refused you couldn't have got the money, could you?" To which the witness replied, "Well, of course -- I don't know."

On redirect examination the witness further stated that he had discussed this matter with Sturgis before and that Sturgis had told him that it was O. K. if he wanted to make the loan; and on recross examination the witness stated that the name of the bank was the First National Bank or the Bank of Oklahoma City, and that the money stood in the name of Professor Sturgis. The witness said, "I could not tell you exactly the date this money was on deposit. I suppose it was in those banks, because my partner is handling my affairs there. Sturgis is my partner. I absolutely know the money was there."

This was all the evidence submitted or heard upon the

The first thing I noticed when I stepped
 out of the car was the cold. It was a sharp
 contrast to the warmth of the car. I shivered
 as I walked towards the building. The air was
 crisp and clear, and I felt a sense of
 freedom. I had been waiting for this moment
 for so long. The building was a large, imposing
 structure with many windows. I walked up the
 steps and entered the building. The interior was
 bright and airy. I felt a sense of
 accomplishment. I had made it. I was here.
 I looked around at the people who were
 working there. They were all so busy, so
 focused. I felt a sense of belonging. I
 was part of this team now. I was part of
 this organization. I was part of this
 mission. I felt a sense of purpose. I
 was here for a reason. I was here to
 make a difference. I was here to change
 the world. I was here to create a better
 future. I was here to live. I was here
 to love. I was here to be. I was here
 to be. I was here to be. I was here to be.

trial, and the record indicates that after plaintiff had closed its case there was a motion made, the exact nature of which does not seem to be disclosed, but apparently it was a motion for^a finding in behalf of the defendant. Such a motion would raise the question of law as to whether there was any evidence from which the court could reasonably find for the plaintiff. Helm v. Comm'l Bank' Assoc., 279 Ill. 576. Had this motion been decided in plaintiff's favor it would then have been proper for the court to weigh the evidence submitted and make a finding according to the law and the facts. Whether the case is considered from the one viewpoint or the other, we think the finding for the defendant was just and it is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

1. The first part of the document is a list of names and addresses of the members of the committee. The names are listed in alphabetical order, and the addresses are given in full. The list is as follows:

Mr. J. H. Smith	123 Main St.	Springfield, Mass.
Mr. W. B. Jones	456 Elm St.	Boston, Mass.
Mr. C. D. Brown	789 Oak St.	Cambridge, Mass.
Mr. E. F. Green	101 Pine St.	Worcester, Mass.
Mr. G. H. White	202 Cedar St.	Lowell, Mass.
Mr. I. J. Black	303 Birch St.	Andover, Mass.
Mr. K. L. Gray	404 Spruce St.	Chelsea, Mass.
Mr. M. N. Hall	505 Ash St.	Everett, Mass.
Mr. O. P. King	606 Willow St.	Medford, Mass.
Mr. Q. R. Lee	707 Hickory St.	Revere, Mass.
Mr. S. T. Young	808 Maple St.	Winthrop, Mass.
Mr. U. V. Adams	909 Elm St.	Chelsea, Mass.
Mr. W. X. Baker	1010 Oak St.	Everett, Mass.
Mr. Y. Z. Clark	1111 Pine St.	Medford, Mass.
Mr. A. B. Evans	1212 Cedar St.	Revere, Mass.
Mr. C. D. Foster	1313 Birch St.	Winthrop, Mass.
Mr. E. F. Gibson	1414 Spruce St.	Chelsea, Mass.
Mr. G. H. Hart	1515 Ash St.	Everett, Mass.
Mr. I. J. King	1616 Willow St.	Medford, Mass.
Mr. K. L. Lee	1717 Hickory St.	Revere, Mass.
Mr. M. N. Miller	1818 Maple St.	Winthrop, Mass.
Mr. O. P. Moore	1919 Elm St.	Chelsea, Mass.
Mr. Q. R. Taylor	2020 Oak St.	Everett, Mass.
Mr. S. T. White	2121 Pine St.	Medford, Mass.
Mr. U. V. Young	2222 Cedar St.	Revere, Mass.
Mr. W. X. Adams	2323 Birch St.	Winthrop, Mass.
Mr. Y. Z. Baker	2424 Spruce St.	Chelsea, Mass.
Mr. A. B. Clark	2525 Ash St.	Everett, Mass.
Mr. C. D. Evans	2626 Willow St.	Medford, Mass.
Mr. E. F. Foster	2727 Hickory St.	Revere, Mass.
Mr. G. H. Gibson	2828 Maple St.	Winthrop, Mass.
Mr. I. J. Hart	2929 Elm St.	Chelsea, Mass.
Mr. K. L. King	3030 Oak St.	Everett, Mass.
Mr. M. N. Lee	3131 Pine St.	Medford, Mass.
Mr. O. P. Miller	3232 Cedar St.	Revere, Mass.
Mr. Q. R. Moore	3333 Birch St.	Winthrop, Mass.
Mr. S. T. Taylor	3434 Spruce St.	Chelsea, Mass.
Mr. U. V. White	3535 Ash St.	Everett, Mass.
Mr. W. X. Young	3636 Willow St.	Medford, Mass.
Mr. Y. Z. Adams	3737 Hickory St.	Revere, Mass.
Mr. A. B. Baker	3838 Maple St.	Winthrop, Mass.
Mr. C. D. Clark	3939 Elm St.	Chelsea, Mass.
Mr. E. F. Evans	4040 Oak St.	Everett, Mass.
Mr. G. H. Foster	4141 Pine St.	Medford, Mass.
Mr. I. J. Gibson	4242 Cedar St.	Revere, Mass.
Mr. K. L. Hart	4343 Birch St.	Winthrop, Mass.
Mr. M. N. King	4444 Spruce St.	Chelsea, Mass.
Mr. O. P. Lee	4545 Ash St.	Everett, Mass.
Mr. Q. R. Miller	4646 Willow St.	Medford, Mass.
Mr. S. T. Moore	4747 Hickory St.	Revere, Mass.
Mr. U. V. Taylor	4848 Maple St.	Winthrop, Mass.
Mr. W. X. White	4949 Elm St.	Chelsea, Mass.
Mr. Y. Z. Young	5050 Oak St.	Everett, Mass.
Mr. A. B. Adams	5151 Pine St.	Medford, Mass.
Mr. C. D. Baker	5252 Cedar St.	Revere, Mass.
Mr. E. F. Clark	5353 Birch St.	Winthrop, Mass.
Mr. G. H. Evans	5454 Spruce St.	Chelsea, Mass.
Mr. I. J. Foster	5555 Ash St.	Everett, Mass.
Mr. K. L. Gibson	5656 Willow St.	Medford, Mass.
Mr. M. N. Hart	5757 Hickory St.	Revere, Mass.
Mr. O. P. King	5858 Maple St.	Winthrop, Mass.
Mr. Q. R. Lee	5959 Elm St.	Chelsea, Mass.
Mr. S. T. Miller	6060 Oak St.	Everett, Mass.
Mr. U. V. Moore	6161 Pine St.	Medford, Mass.
Mr. W. X. Taylor	6262 Cedar St.	Revere, Mass.
Mr. Y. Z. White	6363 Birch St.	Winthrop, Mass.
Mr. A. B. Young	6464 Spruce St.	Chelsea, Mass.
Mr. C. D. Adams	6565 Ash St.	Everett, Mass.
Mr. E. F. Baker	6666 Willow St.	Medford, Mass.
Mr. G. H. Clark	6767 Hickory St.	Revere, Mass.
Mr. I. J. Evans	6868 Maple St.	Winthrop, Mass.
Mr. K. L. Foster	6969 Elm St.	Chelsea, Mass.
Mr. M. N. Gibson	7070 Oak St.	Everett, Mass.
Mr. O. P. Hart	7171 Pine St.	Medford, Mass.
Mr. Q. R. King	7272 Cedar St.	Revere, Mass.
Mr. S. T. Lee	7373 Birch St.	Winthrop, Mass.
Mr. U. V. Miller	7474 Spruce St.	Chelsea, Mass.
Mr. W. X. Moore	7575 Ash St.	Everett, Mass.
Mr. Y. Z. Taylor	7676 Willow St.	Medford, Mass.
Mr. A. B. White	7777 Hickory St.	Revere, Mass.
Mr. C. D. Young	7878 Maple St.	Winthrop, Mass.
Mr. E. F. Adams	7979 Elm St.	Chelsea, Mass.
Mr. G. H. Baker	8080 Oak St.	Everett, Mass.
Mr. I. J. Clark	8181 Pine St.	Medford, Mass.
Mr. K. L. Evans	8282 Cedar St.	Revere, Mass.
Mr. M. N. Foster	8383 Birch St.	Winthrop, Mass.
Mr. O. P. Gibson	8484 Spruce St.	Chelsea, Mass.
Mr. Q. R. Hart	8585 Ash St.	Everett, Mass.
Mr. S. T. King	8686 Willow St.	Medford, Mass.
Mr. U. V. Lee	8787 Hickory St.	Revere, Mass.
Mr. W. X. Miller	8888 Maple St.	Winthrop, Mass.
Mr. Y. Z. Moore	8989 Elm St.	Chelsea, Mass.
Mr. A. B. Taylor	9090 Oak St.	Everett, Mass.
Mr. C. D. White	9191 Pine St.	Medford, Mass.
Mr. E. F. Young	9292 Cedar St.	Revere, Mass.
Mr. G. H. Adams	9393 Birch St.	Winthrop, Mass.
Mr. I. J. Baker	9494 Spruce St.	Chelsea, Mass.
Mr. K. L. Clark	9595 Ash St.	Everett, Mass.
Mr. M. N. Evans	9696 Willow St.	Medford, Mass.
Mr. O. P. Foster	9797 Hickory St.	Revere, Mass.
Mr. Q. R. Gibson	9898 Maple St.	Winthrop, Mass.
Mr. S. T. Hart	9999 Elm St.	Chelsea, Mass.
Mr. U. V. King	10000 Oak St.	Everett, Mass.

EFFIE WHITE,
Appellee,

vs.

PROTECTIVE MUTUAL LIFE
INSURANCE COMPANY (of Illinois)
a Corporation,
Appellant.

201 F.A. 610

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant insurance company from a judgment in the sum of \$500 entered upon the finding of the court. The action was by the plaintiff, Effie White, who sued as the beneficiary named in a policy of insurance on the life of her sister, Laura Edmonds.

The statement of claim alleged the issuance and delivery of the policy by the defendant, the death of Laura Edmonds at Niagara Falls, New York, on February 2, 1928, while the policy was in full force and effect, and proof of death. The statement of claim also alleged that the age of the deceased at the time of her death was not more than 43 years and that defendant refused to pay the amount of the policy.

The affidavit of merits admitted the issuance of the policy on June 13, 1927, but denied that it was issued upon the life of Laura Edmonds, and alleged that the policy was procured by fraud and false representations; that the signature upon the application for the policy was not that of Laura Edmonds, the insured, and defendant relied upon a forged and fraudulent signature; that the person who affixed the signature had no insurable interest in the life of Laura Edmonds nor any relationship to her which would support a policy upon her life.

The affidavit denied that Laura Edmonds was dead, that the policy had been in force, that proof of death had been

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furnished, and that the age of Laura Edmonds was not more than 43 years.

The facts of the case are practically uncontradicted. The only witness who testified was the plaintiff. At the close of her evidence the defendant rested and the court then entered a finding and judgment as above set forth.

The evidence establishes facts from which the court could reasonably find that one Byron Johnson was the agent of the defendant Insurance company; that in May, 1927, Johnson had a conversation with the plaintiff at her home, 5828 Michigan Boulevard, in the course of which he advised her to write to the deceased, who was her sister, and find out whether it would be all right to take out an insurance policy on her life; that at a later time he came back and inquired whether plaintiff had heard from her sister, and she testified he said, "You can take it out and pay it, and she can pay you back;" that thereupon the plaintiff signed the name of her sister, Laura Edmonds, to an application blank in the presence of Johnson, who did all the other writing on the document; that Mr. Johnson, as agent, thereafter also collected the premiums upon the policy which was delivered to plaintiff.

The sister of plaintiff, Laura Edmonds, lived at Niagara Falls. Plaintiff kept in touch with her and from time to time sent money to her. On December 2, 1927, plaintiff sent her sister, who was then sick, \$50. Plaintiff received a telegram informing her that her sister was dead and money was needed to bury her; she sent money to the undertaker and she received a telegram from the doctor where her sister died, giving information of the sister's death. On February 3, 1928, plaintiff sent money to the undertaker and talked with parties in New York over the long distance 'phone. Plaintiff testified positively that she saw the body of her sister after death, had the body taken to an

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undertaker in Chicago, and that she paid the undertaker for his services rendered the sum of \$294. The undertaker was indebted to plaintiff on a promissory note, and she gave him credit for his services on this indebtedness.

The life insurance policy upon which suit is brought is dated June 13, 1927, and it provides that in consideration of a payment of a weekly premium of forty cents the sum of \$500 shall be paid to plaintiff as beneficiary immediately upon receipt at its home office of due proof of the death of the insured, and that the age of the insured appears as 38 years upon the next birthday. The policy also provides that the company may make payment to any relative by blood or connection by marriage of the insured, or to any person appearing to the company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured for burial or other purposes; that the production by the company of a receipt signed by any or either of said persons or of other sufficient proof of such payment to any or either of them shall be conclusive evidence that such payment has been made and all claims under the policy satisfied. The policy also provides that it contains the entire contract and that the policy, together with the application therefor, constitutes the entire contract between the parties; that no agent has the power on behalf of the company to modify the contract of insurance or to extend the time of paying the premiums, and that any change in the policy to be binding on the company must be enforced inwriten and signed by a duly authorized officer of the company.

The defendant insists that the court erred in admitting in evidence over the objection of defendant (1) the alleged proof of death certified by the registrar of the town of Lockport, County of Niagara and State of New York; and (2) the promissory

note evidencing the indebtedness of the undertaker to plaintiff. As the cause was tried by the court without a jury, the admission of this evidence (even if improper) would not constitute reversible error if there was other sufficient competent evidence upon which to base the finding; and we think that, excluding those documents which were objected to, the record shows sufficient evidence. Moreover, there was evidence tending to show that this certificate of the registrar was filed with the insurance company and that an agent of the company thereafter had conversations with the plaintiff in regard to the same, so that, although it be conceded that it was not properly certified the document was not wholly incompetent. We also think the note was properly admitted.

The controlling question in the case is whether the record discloses, as the affidavit of merits alleges, that a contract was made without the consent of the supposed parties to it, and whether the admitted fact that the plaintiff signed the name of her sister to the application constituted such a fraud upon the company as would render the contract of insurance void.

There is nothing in the record which discloses any intention to defraud the insurance company. The plaintiff signed the name of her sister to the application, which was in fact written by the agent of the defendant, at his suggestion.

In Guardian Mutual Life Ins. Co. v. Logan, 92 Ill. 35, our Supreme court in a case which, as defendant points out, is distinguishable upon other points, held that an insurance policy issued upon the life of a father whose name, with the knowledge of the agent writing the insurance, was signed by the son, without the knowledge of the father, was nevertheless a valid contract and that there was no fraud. On the authority of that case, we are constrained to hold that the contract of insurance was valid, and the question of whether plaintiff had an insurable interest in the life of her sister is

therefore not necessary to a decision of the case, although even from that standpoint we think the fair inference from all the evidence is that plaintiff was giving financial assistance to her sister and that she therefore was a creditor who had an insurable interest.

The defendant here also pointed out that there is some conflict in the evidence as to the fact of death and as to the age of the insured. There was, however, sufficient evidence in this respect to sustain the finding of the court. If there was a conflict in the evidence on that point, it was for the court to weigh the evidence, and we are not able to say that the finding is contrary to the weight of it.

We find no reversible error in the record, and the judgment of the trial court is therefore affirmed.

AFFIRMED.

O'Connor, F. J., and McSurely, J., concur.

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SARAH T. BAYRE,
Appellant,
vs.
ROBERT A. BANTSCHI,
Appellee.

251-A. 610³
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on the case for personal injuries the jury returned a verdict for defendant. The plaintiff moved for a new trial, which was denied and judgment was entered on the verdict. To reverse that judgment plaintiff prosecutes this appeal.

Plaintiff sustained the injuries for which she sues on September 5, 1926, at the intersection of 59th street and Ellis avenue in Chicago. Ellis avenue is a public street extending north and south; 59th street is a public street extending east and west.

The injuries were sustained as a result of a collision between a Dodge sedan automobile, which was being driven by one Dean in a northerly direction on Ellis avenue, and a Studebaker car owned and driven in a westerly direction on 59th street by the defendant.

The occupants of the Dodge sedan, of whom plaintiff was one, were returning from a visit at a home near 61st street on South Union avenue. Plaintiff with her sister Priscilla lived at 954 East 55th street, and they were riding home in the automobile owned and driven by Mr. Dean. Plaintiff sat on the right side in the rear seat, her sister Priscilla on the left side of the same seat, and Mrs. Alice Johnson between them. Mr. Dean, the driver and owner, sat in the front seat on the left side, Mr. Johnson on the right side, and Mrs. Dean sat in the seat between Mr. Dean and Mr. Johnson.

The declaration alleged that defendant was guilty of

driving the car in a careless and negligent manner at an excessive rate of speed and also contrary to the statute of the state and the ordinances of the City of Chicago and the South Park. One count alleged that defendant was driving in a wanton and wilful manner.

It is urged that the case was improperly tried upon the theory that the negligence of the driver of the Dodge automobile should be imputed to the plaintiff; that her cause was prejudiced by the unwarranted rebuke of her counsel by the court; that the verdict is against the evidence, and that a new trial should have been granted for that reason; that the court unduly restricted the arguments of plaintiff's counsel.

The plaintiff requested the court to instruct the jury that although the jury should believe that the driver of the automobile in which plaintiff was riding was guilty of negligence, such negligence could not be imputed to the plaintiff. The question with reference to imputed negligence is presented on the record by the denial by the court of the request for this instruction. The defendant insists that this point was covered by other instructions. The instructions as a whole have not been abstracted, and it is therefore impossible for us to determine from this record the merits of the contention. It is the duty of the party complaining to present an abstract in this court from which alleged errors may be determined.

As the judgment must be reversed for other reasons, it is unnecessary to discuss the point urged that the verdict is against the manifest weight of the evidence and that a new trial should have been granted for that reason. The cause will be tried again, and we shall therefore express no opinion upon the weight of the evidence.

We are not impressed with the contention of the plaintiff that her case was prejudiced by an alleged rebuke of her

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attorney by the court. In the course of the examination of plaintiff by her counsel she was asked to go ahead and tell anything that had further occurred without repeating what she had already said. She answered in substance that she was unable to dress herself. Objection was made to this answer and sustained by the court. She was then asked how long the condition she described continued. Defendant objected and was over-ruled, whereupon she replied, "I was not able to do any work at all." Thereupon, the court said that this was not a proper statement, and added, "I am going to take a hand in this thing myself. That is not proper to go into all these things. Gentlemen, step up here. I will tell you what is going to happen to you!" The record shows that the trial judge then retired with both attorneys to his chambers. In support of her contention that the court erred, plaintiff cites Fish v. Ryan, 38 Ill. App. 524; Boherty v. Chicago Ry. Co., 189 Ill. App. 139, and Tarnovsky v. Walker, 191 Ill. App. 610. An examination discloses that the cases are not at all like the one we now review. Indeed, there is nothing in this record from which it appears that the so-called rebuke was directed at counsel for the plaintiff. The plaintiff as a witness seemed somewhat determined to recite her own conclusions rather than the facts to the jury, and the conference in chambers may well have been held to secure the assistance of her counsel in preventing such answers. A trial judge should refrain, of course, from any statement in the presence of the jury from which his opinion on any question of fact might be inferred. Patience is required, and in this instance seems to have been exercised.

The plaintiff next contends that the court erred in his rulings upon objections made in the course of arguments to the jury, by which counsel for plaintiff was prevented from properly presenting the case for plaintiff to the jury. In the course of his argument attorney for plaintiff stated to the jury that the

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testimony was that the car in which plaintiff was riding was half-way across 59th street at the time of the accident. The defendant objected to the statement, insisting that there was no evidence to that effect, and the court sustained the objection. Further, in the course of his argument, the attorney for plaintiff stated, referring to the testimony of Dr. Pease, that the doctor had shown what was the condition of the inner lining of the skull, the inner bone of the frontal part of the skull, and also "the broken bone down on the floor of the cranium." Defendant objected upon the ground that there was no evidence of any broken bone on the floor of the cranium, and this objection was sustained by the court. Again, in the argument attorney for plaintiff called the attention of the jury to the testimony of Dr. White and Dr. Pease, experts for the plaintiff, and Dr. Tenney, an expert who testified for the defendant, and stated, "You heard it from Dr. White and you heard the condition of her skull fracture from Dr. Pease." Counsel for defendant again objected, saying that there was no evidence of a skull fracture, and his objection was sustained by the court.

Again, discussing the question of damages, attorney for plaintiff said that plaintiff had been a money earner before her injury; that she had taken a rest on account of one of her eyes; that she had rested for almost a year or more and that almost immediately after the accident she had to have an operation for cataract. Defendant again objected, stating that there was no evidence that there was an operation, and asked the court to instruct the jury to disregard the statement. Then the following took place:

"The Court: Gentlemen, you will disregard the statement.

Mr. Voigt: She did have an operation for cataract and the evidence shows it.

Mr. Treacy: I ask again that emphasis be placed upon it,

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that the jury be instructed to disregard it.

The Court: The objection will be sustained and the statement about a year after she took a rest that she had to have an operation for cataract, the jury is instructed to disregard."

Without discussing this matter at length, it will be sufficient to state that we have examined the record and find that there was some evidence tending to sustain each one of the statements to which objection was made and sustained by the court. There was no evidence tending to show that operation for cataract was caused by the injury, but this was not the objection made. Whether the alleged facts were established by a preponderance of the evidence was for the jury to decide. There are many cases stating the rule that the attorneys for the respective parties must be allowed to make reasonable comment upon the evidence and the inferences which may properly be drawn therefrom. It is unnecessary to discuss the facts of these cases at length. (See Coldstein v. Smiley, 168 Ill. 438; North American Restaurant v. McElligott, 227 Ill. 317; Buyers Index Pub. Co. v. Triner Mfg. Co., 194 Ill. App. 427.) The right of a party to have the evidence together with all reasonable inferences therefrom presented, is a substantial element of the right of trial by jury, and unreasonable restrictions on this right in a particular case constitute reversible error.

For the reasons indicated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

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BEN GERNSON,
Appellee,

vs.

A. L. WILLIAMS and
NANNIE MAY WILLIAMS,
Appellants.

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APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On March 9, 1928, the plaintiff, Gernson, caused a confession of judgment to be entered in the Municipal court of Chicago against Defendants, A. L. Williams and Nannie May Williams, his wife, upon a note executed December 3, 1927, for the sum of \$1260, payable 90 days after date to the order of Aaron Bodenweiser and associates. The statement of claim alleged the execution and delivery of the note as above set forth and further alleged that prior to the maturity thereof it was transferred to the plaintiff for a valuable consideration. Judgment was entered for the total sum of \$1440.

Thereafter the defendants appeared and made a motion to vacate the judgment, which was allowed. The order provided the judgment should stand as security and the affidavit in support of the motion as an affidavit of merits.

The defense set up in the affidavit was that the note was executed and delivered conditionally to Aaron Bodenweiser and his associates in payment of a commission on a ten year lease of certain premises in Chicago; that Bodenweiser and associates represented to defendants that the usual commission on this lease which was for a gross rental of \$42,000, was three per cent thereof to which defendants objected; that Bodenweiser and Associates told defendants that three per cent was the rate charged by the Chicago and Cook County real estate boards, and that when defendants asked that the ratebook of said boards be produced, Bodenweiser and associates pretended that it had been misplaced and could not be pro-

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duced; that defendants told Bodenweiser and associates they did not know what the rate of commission charged should be, but defendants were told by Bodenweiser and associates that they knew the rate to be three per cent of the gross rental, and that if defendants would execute and deliver a note for that amount they, as payees, would not transfer the note to anyone; and if it was afterwards disclosed that the proper rate was less than three per cent the payees would promptly cancel, surrender and deliver the note to defendants and in lieu thereof defendants would execute and deliver another note for the proper amount.

The affidavit further averred that the rate of said real estate board was found to be one and eight-tenths per cent and not three per cent of the gross rental, as had been represented; that defendants requested that the note upon which judgment was entered be surrendered and delivered to them. The payees refused to do this and proceeded to confess judgment on the note in the name of plaintiff.

The affidavit also averred that Genson, the plaintiff, did not pay any consideration of value for the note and was not a bona fide holder for value or holder without notice before maturity and had no legal or equitable interest in the note, but that the real plaintiffs were Aaron Bodenweiser and associates.

The cause came on for trial by the court. The original judgment was confirmed. This appeal is prosecuted by the defendants.

The defendants have failed to comply with rule 19 of this court and in particular with that portion thereof which requires the complaining party to give "a terse outline of the principal points relied upon for reversal." The argument, however, discloses that the principal complaint is that the court held when the cause came on for trial that the burden of proof was upon the

The following information was obtained from the records of the
 Department of the Interior, Bureau of Land Management, and the
 Bureau of Reclamation, and is being furnished to you for your
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defendants to show that the plaintiff was not a bona fide holder in due course for value. The defendants contend, relying upon section 59 of chapter 98, Smith-Hurd's Rev. Stat. 1927, page 1560, (being a portion of the Negotiable Instrument act) the burden was upon the plaintiff to affirmatively show that he was a holder in due course, and in support of this contention cite Bell v. McDonald, 308 Ill. 329. Said section 59 is as follows:

"Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

An examination of the record discloses, we think, that neither of the parties tried the case upon the proper theory. Sec. 52 of the Negotiable Instrument act defines a holder in due course in substance as one who takes a negotiable instrument complete and regular upon its face before it is overdue, without notice that it has been previously dishonored, in good faith and for value, who at the time the instrument was negotiated had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Section 55 in substance provides that the title of a person negotiating such an instrument is defective within the meaning of the act when he obtained the instrument or any signature thereto by fraud, duress, force, fear, or other unlawful means, or for an illegal consideration, or when he negotiated it in breach of faith or under such circumstances as amount to a fraud.

The affidavit of defense in this case alleged that the owner of this note had negotiated it under circumstances which amounted to a breach of faith, and upon the introduction of proof tending to show that fact section 59 would have become applicable

and the burden of proof would have ^{then} been cast upon the plaintiff to show that he acquired the title to the note as a holder in due course within the meaning of the law. We think this is the proper construction to be placed upon the case of Gill v. McLaughlin, supra.

We have examined this record carefully without finding any evidence tending to show the truth of the allegation that the note was negotiated in breach of faith with defendants. Defendants state in their argument: "All evidence tending to show the fraud of Bodenweiser, the collusion of Bodenweiser and Benson and the agency of Gill, was erroneously excluded by the rulings of the court;" but we are given no reference to the abstract by which this statement may be substantiated. Moreover, an examination of the assignments of error discloses no assignment with reference to the exclusion of testimony offered.

There was much talk in the trial of this case but little evidence was taken. No error has been assigned and argued which would require a reversal, and for that reason the judgment of the trial court is affirmed.

AFFIRMED.

O'Conner, P. J., and McBurney, J., concur.

33009

CONSTANCE RUTKOWSKI,
Appellee,

vs.

M. BRENS,
Appellant.

4204 610
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered in favor of the plaintiff in an action on the case for personal injuries upon the verdict of a jury in the sum of \$400. The cause has been consolidated in this court with General No. 33010, which was a similar action growing out of the same occurrence, brought by Stella Trysko against the defendant. A verdict of guilty was likewise returned in that case with a finding of damages in the sum of \$750, upon which the court entered judgment. In the trial court by stipulation of the parties the causes were tried together and the evidence in both cases was submitted to the same jury.

The facts in brief are that on October 24, 1926, at about 1:30 p. m., Stella Trysko and Constance Rutkowski, the plaintiffs, were riding in a Gardner sedan automobile which was being driven south just west of the center of Spaulding Avenue in Chicago by Frank Trysko, the son of Stella Trysko and the nephew of Constance Rutkowski. Defendant Brens was at that time driving a Buynobile eight sedan east on Flournoy street and approached the intersection of that street with Spaulding Avenue at a speed which the testimony of the witnesses for plaintiff indicates was 25 to 35 miles an hour. His automobile crashed into the one in which Mrs. Rutkowski and Mrs. Trysko were riding, and they sustained injuries as a result of the collision.

It is not urged that the verdict is against the weight

great weight of the evidence, and it will therefore be unnecessary to further discuss the facts. Two points are urged for reversal: first, that the court erred in giving instructions to the jury at the request of plaintiff, and, secondly, that the damages allowed are excessive.

By an instruction complained of the jury was told that it was the sole judge of the credibility of any witness and that if it believed that any witness told an untruth as to any fact material to the issues, the jurors were at liberty to disregard the whole of the testimony of such witness except insofar as that testimony had been corroborated by other credible evidence. It is conceded that this instruction was erroneous in that it failed to state that in order to justify such disregard the jury should believe that the witness had given false testimony knowing it to be false. To justify a jury in rejecting testimony of a witness on this ground, the testimony given by him must have been wilfully and knowingly false. This has been held in numerous cases by the Supreme court of the state and by this court. Pollard v. People, 69 Ill. 148; Penn. Co. v. Conlan, 161 Ill. 93; Panton v. People, 114 Ill. 505; Overton v. C. & E. I. R. R. Co., 121 Ill. 323; Murtaugh v. Murphy, 30 Ill. App. 59; Blackman v. Webber, 161 Ill. App. 53. However, while this instruction was undoubtedly erroneous it appears that at the request of the defendant the court gave instruction No. 12 covering the same point and including the elements of wilfulness and knowledge. Plaintiffs therefore contend that taking the instructions as a series (and since the instruction complained of did not direct a verdict) the error, if any, was cured and that the judgment should not be reversed. On the other hand, defendant contends that the giving of an improper instruction may not be cured by the granting of a correct one, since the jury is not able to select from contradictory instruc-

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tions the one which correctly states the law. To this point defendant cites Orchards v. R. Y. C. & St. L. R. Co., 250 Ill. App. 22; C. C. C. & St. L. Ry. Co. v. Best, 169 Ill. 302; Gilmore v. Fuller, 198 Ill. 130; City of Macon v. Holcomb, 205 Ill. 643; Ill. Match Co. v. C. R. I. & P. R. R. Co., 250 Ill. 396. In all these cases, however, the instructions given were contradictory, and the rule for which defendant contends would be applicable to that state of facts. Here the second instruction is not contradictory of the one complained of, but on the contrary is simply supplemental to it. The instruction complained of did not direct a verdict. It was not contradictory of any other instruction and an intelligent jury could not, we think, be misled. There are numerous authorities which hold that under such circumstances an erroneous instruction will not require a reversal. C. C. C. & St. L. Ry. Co. v. Walter, 147 Ill. 60; C. & A. R. R. Co. v. Matthews, 153 Ill. 269; City of Woodhouse v. Christian, 159 Ill. 137.

Defendant insists, however, that the damages are grossly excessive. Mrs. Trysko's collar bone was fractured, her arm and muscles were bruised, her left breast was black and blue and her hands were injured to such an extent that they were bandaged for five or six weeks. She testified that she suffered pains in the collar bone and breast and was unable to work for four or five weeks. Her doctor bill was \$35. Both women were taken to the hospital. Mrs. Rutkowski testified that her right shoulder was bruised and that she had a fractured rib, a cut over the right eye and that her head was badly bruised; that her whole right side was black and blue; that her rib was taped at the hospital. Her doctor bill was \$15, and she was rendered incapable of doing work for some time. While the injuries of the plaintiffs were not of the most severe nature, they were substantial, and even if we considered the damages high we would not be justified in substituting our opinion for that of the jury which has been approved by the trial Judge.

The judgment is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

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33010

STELLA TRYSKO,
Appellee,

vs.

M. ERENS,
Appellant.

251 LA 611

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This cause was consolidated for hearing with general number 33009, in which an opinion has this day been filed. By stipulation of the parties the causes were tried together by the same jury. The injury to the plaintiffs grew out of the same occurrence.

The opinion filed this day in general number 33009 covers the facts and the law applicable to this case, and for reasons stated in that opinion the judgment here is also affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

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33063

ILLINOIS REFRIGERATOR CO.,
a Corporation,

Appellee,

vs.

CHARLES F. ROBERTS and
IVAN D. TEFFT,

Appellant.

251 I.A. 611

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants, Roberts and Tefft, from a judgment in the sum of \$644 entered upon the finding of the court to the effect that the defendants were "guilty of having maliciously, wilfully and intentionally, and with intent to injure and defraud the plaintiff, converted to defendants' own use the goods and chattels of plaintiff as described in plaintiff's statement of claim, and assessed the plaintiff's damages at the sum of six hundred forty-four and 00/100 dollars (\$644.00) in tort."

The statement of claim discloses that this suit was brought upon the theory that Roberts and Tefft, who were officers and directors of the Household Devices Company, a corporation, on or about January 1, 1927, converted to their own use four No. 5 refrigerator units and one No. 907 Deluxe refrigerator, which had been left with the corporation, of which these defendants were officers, on consignment for sale.

The evidence discloses that the Household Devices Company was doing business in the year 1926 at Evanston, Illinois, as distributor of goods of this character. The corporation appears to have been organized in the year 1924 or 1925, and after its organization defendant Tefft was a director, stockholder, and acted as its president and general manager. Defendant Roberts afterwards became a stockholder and held the position of secretary

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and treasurer. Tefft conducted the affairs of the corporation and had general supervision of all its business. Roberts was inactive most of the time and other business matters took him to Florida. Roberts was the agent for the Superior Electric Refrigerator Company in Miami in that state.

The plaintiff corporation appears to have had its principal office at Morrison, Illinois, and also an office in the Furniture Mart at Chicago. One Freer was its sales manager and a Mr. Loving seems to have acted as a traveling salesman. The Chicago office, insofar as the evidence discloses, was in charge of a Miss Sattler, who Kirberg, the treasurer of the plaintiff company, describes as "the office girl."

Roberts advised Tefft that he should get in touch with the plaintiff company in regard to the refrigerators sold by them, and on or about March 23, 1926, Mr. Loving took the written order of the Household Devices Company for the goods here in controversy. The order was signed by Tefft as president. The goods were afterwards delivered to the Household Devices Company, which afterwards complained that they were defective. This matter seems to have been taken up with Loving, and it was arranged by him (and the arrangement seems to have been afterwards approved by plaintiff's sales manager) that the goods should be left with the Household Devices Company on consignment to be paid for to the plaintiff when sold. The Household Devices Company was in a failing condition financially, and on or about January 1, 1927, it ceased to do business. Prior to that time a levy had been made upon its property by a judgment creditor.

Tefft testified (and his testimony is not contradicted) that after a talk with Mr. Loving, the representative of plaintiff with whom he had his dealings concerning this property, he shipped the goods in question to the Superior Electric Refrig-

erator Company. Concerning his conversation with Loving he testified:

"I told him something had to be done. I said, 'We are shipping the boxes back.' He said, 'Go ahead and ship them back.' I called the Chicago office and asked Miss Sattler and she said, 'Go ahead and ship them back to the Superior Refrigerator Company.' Then within two or three weeks, I gave orders within a very short period to have them put in the back end of the building. I gave orders to ship them back to the factory, the Superior factory, as they were endangering the health of the occupants of the building. After they left I suppose I did talk to Mr. Loving and Miss Sattler two or three times. They were the only ones in fact I ever had any direct connection with. It was the understanding they had authority to act in this territory."

Airberg, the treasurer of the plaintiff company, testified to the effect that Loving was simply a salesman on a commission basis without authority to make contracts unless the same had been first accepted by the company at Morrison, Illinois, and that he did not at any time authorize either Loving or Miss Sattler to consent to the shipment of the units to the Superior Refrigerator Company.

Plaintiff contends that Loving was without authority and cites Merchants Nat'l Bank v. Nichols & Co., 223 Ill. 41, to the point that persons dealing with an assumed agent are bound at their peril to ascertain not only the fact of the agency but the extent of the agent's authority. That rule of law which undoubtedly obtains where a question as to the authority to make or endorse negotiable paper arises, is not, we think, applicable to a situation such as is disclosed by this record. The distinction has been pointed out by this court in Hodges v. Bankers Surety Co., 152 Ill. App. 372, and in Edwards & Deutsch L. Co. v. Hildman P. Co., 221 Ill. App. 61. In the latter case we cited with approval Mechem on Agency, vol. 1, sec. 246, to the effect that as a general rule whenever a person has held out another as his agent, authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in that capacity, or where his habits and course of dealing have been such as to reasonably warrant the

presumption that such other was his agent authorized to act in that capacity, whether it be in a single transaction or in a series of transactions, his authority to such other to so act for him will be conclusively presumed to have been given, insofar as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence.

The evidence here discloses a course of dealing over quite a period of time in which Loving acted as the representative of the plaintiff, and correspondence during that time was carried on between the plaintiff and the Household Devices Company without any disavowal on the part of the plaintiff of the authority of Loving. Miss Satler, too, was in charge of the office at Chicago, and the defendant Tefft had, we think, a right to rely upon her apparent authority. However this may be, the course of dealing with the plaintiff was with the Household Devices Company, a corporation, and not with these defendants individually.

We do not question the rule for which plaintiff contends, that directors, officers or agents of a corporation may be liable for conversion even though they act as officers in behalf of the corporation, provided they personally participate in the conversion. If there was any conversion here, however, it would appear that Tefft alone is liable, since there is no evidence in the record tending to show that the other defendant, Roberts, had knowledge of or participated in the alleged tortious act of sending these refrigerators to the Superior Refrigerator Company.

As there is no evidence from which the court could reasonably find against Roberts, the judgment cannot stand. It will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Measurely, J., concur.

MIDWESTERN COMPANY, a Corporation,
Appellee,

vs.

WARSHAWSKY & CO., a Corporation,
Appellant.

281 F.A. 11³
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This cause was here on a former appeal from a judgment for plaintiff in the sum of \$2,000, which was reversed for errors in instructions and because the amount of the damages allowed was not sustained by the evidence.

Upon the second trial there seems to have been little, if any, effort to avoid a repetition of the errors pointed out in the former opinion. Midwestern Co. v. Warsawsky & Co., 240 Ill. App. 673. The jury returned a verdict in the sum of \$3812.50, upon which the court, over-ruling motions for a new trial and in arrest, entered judgment.

The material facts are few and simple. The defendant was in the business of buying and selling used and scrap machinery. It had an office on Wabash avenue in Chicago and a warehouse at 1915 South State street. On November 24, 1922, defendant sold to plaintiff a National Brake and Electric compressor with motor No. 537A, complete for the price of \$1200. Plaintiff at that time gave a check for \$200 on the purchase price. It was agreed that the balance should be paid when the compressor was removed from the warehouse. Defendant gave a receipt for the payment, on which was printed, "not responsible for goods left over thirty days." An employee of defendant, named Walter Ostrowsky, attended to the sale for defendant, and the evidence for plaintiff tends to show that at the time of giving the receipt Ostrowsky asked the broker, Mr. Schmidt, "When will you take that out?" Schmidt replied, "In twenty or thirty days."

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Plaintiff did not thereafter call for the compressor and on January 18, 1923, the defendant sold the machine to Ben Sanders for \$1,000 without giving plaintiff notice of the intended sale. Plaintiff had not called for the compressor because it was unable to find a purchaser to whom it might resell it, and when its representative thereafter called at defendant's place of business with a prospective purchaser it was informed for the first time that the compressor had been sold.

Defendant claims that at the time of the sale on November 24th, a writing was delivered to plaintiff which stated that plaintiff should take the machine within ten days, but this is denied by plaintiff, and for the purposes of this opinion we will regard this issue of fact as settled against defendant and in favor of the plaintiff by the verdict of the jury.

Another material issue of fact in the case is whether the compressor was a new or second-hand machine. Plaintiff contends that it was new; defendant that it was second-hand. Notwithstanding the verdict of the jury we must hold that the manifest weight of the evidence on this issue of fact indicates that the machine was second-hand. Two or three witnesses testified for plaintiff, giving uncertain evidence tending to show that it was new, but four witnesses who had positive knowledge testified that it was a used machine. Moreover, the undisputed facts that defendant was a dealer in second-hand goods and that the compressor was sold to plaintiff for \$1,200, while the price for a new machine of the same kind was \$4,500, are persuasive. To believe that a second-hand dealer would sell a new machine, of which the market price was \$4,500, for \$1,200, requires a degree of credulity which this court does not possess. This conclusion alone requires a reversal of the judgment, since it follows the damages allowed are against the manifest weight of the evidence. The motion for a new

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 This has led to a situation where the
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 This has led to a situation where the
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trial should have been granted for that reason.

There are other reversible errors. Notwithstanding the former opinion of this court to the contrary, over the objection of the defendant evidence was given in behalf of plaintiff to the jury of an offer to buy as tending to establish the market value of the compressor. Midwestern Co. v. Warshawsky & Co., supra. Moreover, the contract of sale fails to establish that such damages were within the contemplation of the parties. Nadley v. Baxendale, 9 Exch. 341; Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540.

Again, some of the instructions, while correct as abstract propositions of law, were not applicable to the facts, and it was therefore reversible error to give them.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and McCurely, J., concur.

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JOSEPH HARRIS,

Appellee,

v.

CHICAGO TITLE AND TRUST COMPANY,
administrator with the will
annexed of the estate of JOHN B.
RUSSELL, deceased, HARRIS TRUST
AND SAVINGS BANK and ADDRESSING
MACHINES SECURITIES COMPANY,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed January 30, 1929

MR. PRESIDING JUSTICE H. L. COM delivered the
opinion of the court.

This case has been decided in case general number
32736, with which it was consolidated for hearing and in
which an opinion has this day been filed. That opinion is
by adoption also made the opinion in this case, and for the
reasons in that opinion stated and set forth the decree of
the Circuit Court in this case is reversed and the cause
is remanded with directions to the Circuit Court to enter
a decree dismissing the bills for want of jurisdiction.

REVERSED AND REMANDED WITH DIRECTIONS.

WILSON AND RYNER, JJ. CONCUR.

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32735

JOSEPH HARRIS,

Appellee,

v.

CHICAGO TITLE AND TRUST COMPANY,
administrator with the will
annexed of the estate of JOHN B.
RUSSELL, deceased, HARRIS TRUST
AND SAVINGS BANK and ADDRESSING
MACHINES SECURITIES COMPANY,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed January 30, 1929

MR. PRESIDING JUSTICE HOLDOM delivered the
opinion of the court.

This case has been decided in case general number
32736, with which it was consolidated for hearing and in
which an opinion has this day been filed. That opinion is
by adoption also made the opinion in this case, and for the
reasons in that opinion stated and set forth the decree of
the Circuit Court in this case is reversed and the cause is
remanded with directions to the Circuit Court to enter a
decree dismissing the bills for want of jurisdiction.

REVERSED AND REMANDED WITH DIRECTIONS.

WILSON AND HYNER, JJ. CONCUR.

INTERSTATE OPTICAL COMPANY,
a corporation,
(Plaintiff) Appellant,

v.

ILLINOIS STATE SOCIETY OF OPTOMETRISTS
AND THE CHICAGO OPTOMETRIC SOCIETY,
both corporations not for pecuniary
profit; DR. F. T. LEE, DR. EMERY MUNSON,
DR. FORD A. SMITH and DR. FRANK WALLACE,

Defendants.

ILLINOIS STATE SOCIETY OF OPTOMETRISTS,
a corporation, and R. F. T. LEE,
(Defendants) Appellees.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

Opinion filed January 30, 1939

MR. PRESIDING JUSTICE HOLCOM delivered the
opinion of the court.

This cause is before this court for review for the
second time. The decision of this court upon the former
appeal is reported in the 244 Illinois Appellate 158, to which
we refer for a full statement of facts and the law governing
such facts.

The trial court sustained a demurrer to the second
amended declaration and dismissed the suit of plaintiff at
its costs. On review, on appeal, this court, for the error
of the Circuit Court in sustaining such demurrer and in dismiss-
ing the suit, reversed its judgment and remanded the cause
for a new trial.

The only change made in the record since the remand-
ing of the cause for a new trial is the interposition by the
plaintiff of a demurrer to the seventh plea of defendants,
being a plea of the statute of limitations, which demurrer

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the court overruled, and plaintiff electing to stand by its demurrer to such plea, a judgment of nisi capiat and for costs was entered, from which plaintiff again brings the record to this court for review.

The seventh plea of the statute of limitations averred inter alia that "the supposed causes of action in the said second amended declaration mentioned did not accrue to the plaintiff at any time within one year next before the filing of said second amended declaration" etc.

This plea was vulnerable to the demurrer interposed because instead of averring the time when the statute commenced to run against the action being within "one year next before the filing of said second amended declaration", it should, to be effective, have charged "one year before the commencement of the suit."

The original declaration stated a cause of action for libel, and the second amended declaration in no wise stated a new cause of action. The statute of limitations was arrested by the commencement of the action and not inferable from the time of the filing of the second amended declaration. This whole question was fully disposed of by this court in the decision, supra, in which it is said:

"It is also contended that the mere allegations in the declaration that the words were used 'of and concerning the plaintiff, and of and concerning the business of the plaintiff,' and that the plaintiff was damaged 'in its business,' were insufficient, unless some allegation was made by innuendo or implication, showing that the plaintiff was in the business of examining eyes. But the declaration stated that the plaintiff was 'engaged in the furnishing of optical advice and spectacles.' and that, we think,

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was sufficient. " * * * We feel bound to hold that the words directly tend to the prejudice and injury of the plaintiff in its trade and business, and are actionable without proof of special damage." (Swift v. Madden, 185 Ill. 41.)

The second amended declaration did not set up a new cause of action differing from the cause of action set out in the original declaration.

The former opinion of this court, supra, together with this opinion constitutes the law governing this case and its retrial.

For the reasons stated in this opinion the judgment of the Circuit Court is reversed and the cause is remanded for a new trial in accord with the views herein and in the former opinion of this court in 244 Appellate 158 expressed.

REVERSED AND REMANDED.

WILSON AND RYNER, JJ. CONCUR.

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CLARENCE H. ALEXANDER,

Appellee,

v.

CHARLES HOEKSTRA and GEORGE H.
HOEKSTRA, co-partners doing
business under the firm name
and style of Hoekstra Overall
Laundry,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

Opinion filed January 30, 1929

MR. PRESIDING JUSTICE HOLDOM delivered the opinion
of the court.

This cause of action arises from a collision between
the automobile of the plaintiff and the laundry truck of the
defendant at the intersection of Wabash Avenue and 76th Street,
Chicago. The trial was had under a count in plaintiff's declar-
ation charging negligence generally. Defendant filed two pleas,
one the general issue and the other non-ownership. The trial
was before court and jury with a resulting verdict for plaintiff
and an assessment of damages at the sum of \$800. After overruling
motions for a new trial and in arrest of judgment there was a judg-
ment entered upon the verdict, and defendant brings the record
to this court for review by appeal.

Defendant assigns error and argues for reversal that
the verdict of the jury is contrary to law and against the greater
weight of the evidence and that the verdict and judgment thereon
are excessive.

The evidence develops that the plaintiff and his
driver, one James L. Cost, were proceeding to their home at about
noon on September 26, 1925, at 7601 Eggleston Avenue, Chicago,

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where they both lived. Cost was driving the car. Plaintiff was sitting in the right hand front seat, and the driver was sitting at the wheel, which is on the left hand side of the car. Cost was familiar with the operation of the car, having driven it for about a year. The car was being driven on the right hand side of 76th Street in a westerly direction as it approached Wabash Avenue at a speed of not exceeding fifteen miles per hour. The wheels of plaintiff's car were within four or five feet of the north curb of 76th street, which is approximately twenty-two to twenty-five feet in width. The car approached the corner, according to plaintiff's testimony, at about eight miles an hour, and slowed down to nearly a stop as it drew near to Wabash avenue. Plaintiff and the driver both claim that they looked to the right when they were within thirty to forty feet from the east curb of Wabash avenue, and saw defendant's laundry truck about 140 to 150 feet to the north. The pavement was wet and slippery. When plaintiff's car was more than two-thirds of the way across Wabash avenue, defendant's laundry truck, which was running at a high rate of speed from the north, crashed into plaintiff's car, turning it over once and a half, and throwing plaintiff on to the street with such force that he sustained a fracture of the right clavicle, and bruises and abrasions to various parts of his body.

There is much contradiction in the evidence as the testimony of defendant's witnesses was to the effect that plaintiff's car approached the intersection of Wabash avenue and 76th street at a high rate of speed; that it narrowly avoided a collision with another automobile at the intersection of Michigan avenue and 76th street; that defendant's truck was being driven

There is a great deal of work to be done in the field of the history of the United States. The first step is to collect the materials. The second step is to organize them. The third step is to write the history. The fourth step is to publish the history. The fifth step is to distribute the history. The sixth step is to read the history. The seventh step is to discuss the history. The eighth step is to teach the history. The ninth step is to learn from the history. The tenth step is to live by the history.

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upon Wabash avenue by Michael H. Murphy, an employee of defendant, in a southerly direction at a speed of between fifteen and twenty miles an hour; that as the driver approached the intersection he slowed down the truck, looking to the right and to the left, and observed plaintiff's automobile approaching from the east and about 75 feet away from the intersection. On the theory that the driver had the right of way under the statute he proceeded on into the intersection, when he observed that the automobile of plaintiff continued to come on at a high rate of speed, veering over to the left side of 76th street in an attempt to cut him off; that the driver of defendant's truck believing a collision to be imminent turned to the west on 76th street in an effort, as he claimed, to avoid an impact with the result that the right hand wheel of plaintiff's automobile struck the left front wheel of defendant's truck, bending the axle and wheel over toward the right hand wheel, and that the collision occurred on the southwest corner of the intersection. No witness for defendant disputes the fact that plaintiff suffered the injuries to which he testified, as a result of the collision.

We have carefully scanned the evidence pro and con found in the record, and with the inferences which under the law may be reasonably indulged as to the right of the jury in weighing the testimony of the several witnesses of the parties to give credence to one and disbelief as to the other, we see no reason justifying this court on review in holding that the verdict and the judgment are contrary to the manifest weight of the evidence.

As to the amount of the verdict being excessive, considering the plaintiff's injuries, which are not in dispute, suffered as a result of the accident, the verdict of \$600 is not

222 *Journal of Management Inquiry* 16(2)[illegible]

The first of the following is a list of the names of the persons found in the records of the Bureau of the Census, who were born in the United States and who were living in the United States in 1940. The second is a list of the names of the persons found in the records of the Bureau of the Census, who were born in the United States and who were living in the United States in 1940. The third is a list of the names of the persons found in the records of the Bureau of the Census, who were born in the United States and who were living in the United States in 1940.

excessive. On the contrary it is quite reasonable, and no more than scant compensation for such injuries.

The questions of the weight of the evidence and the credibility of the witnesses, and the effect to be given to their evidence, were peculiarly the province of the jury to determine. So far as the evidence of the plaintiff is concerned, it in itself was sufficient to warrant the verdict in his favor, and the jury having seen the witnesses and heard their testimony and the manner and conduct of the witnesses upon the witness stand, privileges denied this court, were much better able than are we to judge of the credibility of the several witnesses. It was for the jury to conclude by their verdict where the truth lay in the conflicting versions of the respective parties as to the occurrence of the accident; and we would not be justified in holding, in the state of the evidence in the record, that the verdict of the jury is contrary to its probative force.

As said in Pienta v. Chicago City Ry. Co. 284 Ill.

246:

"There is no possible way to harmonize the conflicting testimony on the material points as to just how the accident occurred, either as to the distance of the car south of the stalled truck when Ptasek started to drive over the northbound track, or how rapidly the car or the horse and wagon were traveling, or at what point on the wagon, near the front or rear, the car struck. All these are questions of fact, as to which, in a case of this kind, this court must be controlled by the verdict of the jury and the judgment of the trial court. ***"

The foregoing statement is strongly applicable to the condition of the evidence in the instant case.

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The question of defendant's having the right of way at the intersection of Wabash avenue and 76th street, was likewise one proper for the jury to determine from the evidence. The plaintiff testified "we were apparently across the street when the truck hit us", and Cost, the driver, testified, "I was over two-thirds of the way across the street when we were struck by the automobile truck." From this testimony and the countervailing proof, it became the duty of the jury to decide whether or not defendant, at the time of the happening of the accident, was lawfully maintaining his right of way, or whether he negligently ran into plaintiff's car when it was nearly clear of the track in which defendant was driving.

In Heidler Co. v. Wilson & Bennett Co., 343 Ill. App. 89, where the parties, being in a similar situation, the court said:

" * * the evidence showed that the collision occurred when the car approaching from the left had reached the area beyond the middle of the intersection and the one approaching from the right had not then reached the middle of the intersection and where the car coming in from the left was struck in the rear by the front part of the car coming in from the right. In that situation, we believe it may not be said, as a matter of law, that the driver of the vehicle approaching from the left failed to exercise due care in believing that the car coming in from the right, not having reached the intersection when he did, was sufficiently far away, that, considering the rates of speed of the two cars, he had time to cross the intersection before the other car reached his line of travel."

And in Salmon v. Wilson, 227 *ibid.* 286, the court said:

"While the statute gives the right of way to vehicles approaching along intersecting highways from the right over those approaching from the left, it manifestly does not intend to confer that right regardless of the distance the approaching cars may be from the point of intersection. It does not contemplate that the right may be invoked when the car from the right is so far from the intersection at the time the car from the left enters upon it, that, with both running within the recognized limits of speed, the latter will reach the line of crossing before the former will reach the intersection. " " Under the claim of right of way defendant certainly had no right to keep up a speed that was *prima facie* a violation of the law and run down one who was observing the law. The statute contemplates the assertion of such right of way where cars approach the intersection at about the same time. In such a case, maintaining as each should a position on the right-hand side of the street on which he is running, the car from the right would generally be nearer the point of crossing and entitled to assert its right of way under the rule of the road as well as the statute."

If the jury believed plaintiff's testimony and that of his driver that plaintiff's car was apparently across the street when hit by the laundry truck, and that plaintiff's car was over two thirds of the way across the street when defendant's truck hit it, then they were fully justified in finding the verdict for the plaintiff which they did. From such finding the jury impliedly concluded that plaintiff was not guilty of any act which constituted contributory negligence.

Seeing no lawful reason for disturbing the verdict of the jury and the judgment of the court thereon, the judgment of the Superior Court is affirmed.

AFFIRMED.

WILSON AND RYNER, JJ., CONCUR.

1. The first part of the report deals with the general situation of the country and the progress of the work during the year. It is a summary of the work done by the various departments and a statement of the results achieved. It is a general statement of the work done by the various departments and a statement of the results achieved.

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32904

GEORGE THOMAS MORRIS,
Defendant in Error,

v.

FRANK WHITE, et al.,
Plaintiff in Error.

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WRIT OF ERROR

TO CIRCUIT COURT,

COOK COUNTY.

Opinion filed January 30, 1929

MR. JUSTICE RYNER delivered the opinion of the
court.

This case comes here upon a writ of error brought by the defendant to have reviewed a judgment of the Circuit Court of Cook County against him for \$2500.00. The action was in tort for fraud and deceit, and a trial by jury was had. The errors assigned upon the record are that the judgment is contrary to law and the evidence; that the court erred in admitting evidence for and on behalf of the plaintiff, and that the court should have given to the jury a peremptory instruction to find in favor of the defendant.

If it is intended, by the assignment that the judgment is contrary to the evidence, to raise the question as to the sufficiency of the evidence to sustain the verdict, we are not at liberty to consider it. This question can only be preserved for review by making a motion for a new trial and then assigning as error the ruling of the trial court in denying the motion. Yarber v. Chicago and Alton Ry. Co., 235 Ill. 569. No such error has been assigned and it does not even appear from the abstract that such a motion was made, or if made, that an exception to the ruling of the court was properly preserved. A mere recital in the order of judgment that the court overruled a motion for

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a new trial will not suffice. All proceedings pertaining to this motion are made a matter of record only by a bill of exceptions.

The assignment that the court erred in admitting evidence for and on behalf of the plaintiff is wholly insufficient to present any question for review. It is not stated what the evidence received was, nor that it was improper, incompetent or immaterial.

The only assignment of error deserving consideration is, that the court denied the defendant's motion to instruct the jury to find the issues in its favor.

This motion raises only the legal question as to whether there is any evidence fairly tending to support the plaintiff's case. The weight of the evidence cannot be questioned. Pate v. Blair-Big Muddy Coal Co., 253 Ill. 198. See also, Shannon v. Nightingale, 321 Ill. 188, where the court said:

"An instruction taking the case from the jury should be given only where the evidence, with all the legitimate and natural inferences to be drawn from it, is wholly insufficient, if credited, to sustain a verdict for the plaintiff. It is immaterial upon which side the evidence is introduced. If there is evidence which fairly tends to support the plaintiff's case it must be submitted to the jury, (Purdy v. Hall, 134 Ill. 398; Fullman Palace Car Co. v. Laack, 143 id. 248; Lake Shore and Michigan Southern Railway Co. v. Richards, 153 id. 59;) and no question of its sufficiency to support the verdict can be raised in this court. It is a question of law whether there is any evidence tending to prove the allegations of the plaintiff's declaration, and it is a question of fact, where there is such evidence, whether it is sufficient to sustain such allegations. The former is a question for the court; the latter a question for the jury, subject to revision by the court on motion for a new trial."

The facts will be stated only to the extent necessary for the determination of the question whether as a matter of law the trial court should have given the peremptory instruction

requested. Some time in June, 1925, the plaintiff purchased from the defendant a gas filling station for a consideration of \$15,000.00. Evidence was introduced by the plaintiff to the effect that the defendant represented that he was averaging a net profit of \$500.00 per month from the sale of gasoline and oil and the greasing of cars, and that he was selling approximately 10,000 gallons of gasoline per month. There was also evidence showing or tending to show that the defendant was selling only about 6,000 gallons of gasoline per month. Counsel for the defendant contend that the evidence shows that the plaintiff made an independent investigation of the facts before he purchased, and that he relied upon the information thus obtained and not upon the representations of the defendant. All of these matters were questions for the jury.

We have examined all of the evidence and are satisfied that the trial court did not err in refusing to give to the jury the peremptory instruction tendered on behalf of the defendant.

The judgment of the Circuit Court of Cook County is, therefore, affirmed.

AFFIRMED.

HOLDOM, P.J. AND WILSON, J. CONCUR.

33941

JOHN H. CARBAUGH,

Appellee,

v.

CHICAGO TITLE AND TRUST
COMPANY, as Administrator
with the Will Annexed of
Charles A. Dickens, Decedent,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed January 30, 1929

MR. JUSTICE RYAN delivered the opinion of the court.

John H. Carbaugh, appellee here, filed his claim in the Probate Court of Cook County in the amount of \$2,860.00 against the estate of Charles A. Dickens, an insane person. The claim was disallowed. Upon an appeal to the Circuit Court of Cook County a trial, without a jury, was had, resulting in an allowance of the claim in the sum of \$2,800.00, together with interest from June 23, 1924, making a total of \$3,735.00. Dickens having died during the pendency of the appeal to the Circuit Court, the Chicago Title and Trust Company, as administrator with the will annexed, was substituted as defendant.

The claim, as originally filed, was for five items of cash loaned and advanced in the years 1904 and 1905, totalling the sum of \$2,860.00 and for the balance due on an account stated on, to-wit, March 1, 1924, in like amount. Upon the trial in the Circuit Court the claim was amended by striking out the items for cash loaned, leaving only that portion of the claim which predicated a right to recovery upon an account stated. The defendant, Chicago Title and Trust Company, as administrator, has perfected this appeal.

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Dickens was married to Carbaugh's daughter. She died June 19, 1934, and was buried at Lanark, Illinois, where Carbaugh resided. Four or five days after the funeral Dickens and Carbaugh met at the office of C. G. Elmer, an attorney practicing in Lanark. According to his testimony, they stated that they met there to transact certain business relative to the estate of Mrs. Dickens and to the settlement of certain property rights between them. Elmer, the attorney, had represented Carbaugh before, but had never represented Dickens.

The parties finally came to an agreement which Elmer proceeded to reduce to writing, doing his own typewriting. The document prepared was a formal one consisting of about two pages and was introduced in evidence as Defendant's Exhibit 1. It was under seal and both parties made formal acknowledgment of it, Elmer acting as the Notary Public. By this solemn instrument Dickens released and assigned to Carbaugh all interest in his wife's estate and agreed to abide by the terms of her last will and testament. In turn Dickens was relieved of responsibility for all claims against his wife's estate for funeral expenses incurred by him. It was further provided that Carbaugh should convey certain real estate located in Wilmette, Illinois, subject to existing incumbrances, to Dickens. The agreement further recites that as part consideration for the conveyance of the real estate Dickens paid to Carbaugh the sum of \$750.00 "in the form of releasing \$150.00 claim which he had paid on the funeral expenses of said deceased and giving him credit for Six Hundred Dollars which he had heretofore expended for care and attendance for said deceased." It also recites that Dickens has executed to Carbaugh his promissory note for \$750.00 due six months after date.

Carbaugh was an incompetent witness on the trial in the Circuit Court because of the death of Dickens. He was permitted to testify only to the fact that Dickens had been married to his daughter. Otherwise, Elmer was the sole witness for the plaintiff. No one testified on behalf of the defendant.

Elmer testified that he had previously represented Carbaugh in preparing some legal papers; that on the occasion in question he presumed that he represented both parties; that the parties were in his office about an hour; that Dickens was nervous and in a hurry; that while he was typewriting the instrument above referred to, Defendant's Exhibit 1, Dickens and Carbaugh were talking about their general affairs but that he did not hear all of the conversation and has so testified on a previous occasion; and that the parties discussed their business affairs both with regard to the Wilmette property and also concerning their general financial relations.

Elmer further testified that the Wilmette property belonging to Dickens was carried in the name of Carbaugh and that the latter had put \$800.00 into the property; that, at the time, the parties were in his office, Dickens said he wanted a reconveyance as he desired to sell his property and get rid of his business worries; that Carbaugh said the real estate could be unloaded without a reconveyance, but Dickens replied that he could deal more advantageously with buyers if the title of record was in his own name; that Carbaugh then said that he did not like to reconvey without some security for the money he had put into the property and that Dickens owed him, and that Dickens objected to a mortgage on the property for all he owed Carbaugh because it would hamper a sale, there being a large first mortgage on the

property. When asked whether any amount was mentioned he testified that Carbaugh said, "Well, I would like to have the whole \$3600.00 secured," and that Dickens replied, "Well, you don't need to worry, I never beat you out of anything yet;" that Carbaugh then said, "If I transfer it back, why cannot we have a mortgage for the whole amount, as well as for the \$800.00 that I put in the property while it was in my hands?" that Dickens objected to a mortgage and said, "You don't need to worry about getting your money, because I am going to unload the damned stuff, just as quick as I can, and when I unload it, you are going to get your full amount;" and that Carbaugh said that he would accept a second mortgage to secure him for the money he had put into the property.

The witness further testified that the amounts \$3,600.00 and \$800.00 were mentioned but the exact balance was not stated. On direct examination he said that he was preparing some papers in connection with the estate of Mrs. Dickens when the conversation about a reconveyance of the Wilmette property and the amount Carbaugh said was due him took place. On cross-examination he said that he was engaged in typewriting Defendant's Exhibit 1 while the parties were talking about their general affairs but finally stated that he was certain that the conversation about the \$3,600.00 took place subsequent to the completion and execution of Defendant's Exhibit 1.

Within about three months after the conversation in Elmer's office, Carbaugh commenced an attachment suit in the Superior Court of Cook County against Dickens. In the bill of particulars it was stated that the suit was for the recovery of cash loaned and advanced to Dickens in the years 1904 and 1905, with interest from March 1, 1924. The affidavit of plaintiff's

claim was to the same effect. The date, March 1, 1924, antedated the time of the conversation in question by almost three months. It was not until the claim was filed in the Probate Court, three years later, that an account stated was relied upon. Again interest was claimed from March 1, 1924.

In the latter part of 1924 Garbaugh recovered a judgment against Dickens. The matter was adjusted. Garbaugh in a letter to the Wilmette State Bank stated that the cause of the suit was a slight misunderstanding between himself and Dickens.

If we accept as true Elmer's version of the conversation, all of which he admits that he did not hear, then the parties met primarily for the purpose of adjusting matters pertaining to the estate of Mrs. Dickens. If that be true, why was the provision for the reconveyance of the Wilmette property incorporated in Defendant's Exhibit 1? It had no apparent connection with the settlement of the estate of Dicken's wife. Let us assume, however, that Elmer is correct. Garbaugh made no demand upon Dickens for the payment of \$3,600.00 or any other sum. He asked for a second mortgage on the Wilmette property. Dickens declined to grant the request except to the extent of securing payment of the sum Garbaugh had invested in the property. Dickens did not say that the amount so invested was \$800.00 nor did he say anything indicating that he agreed that he owed Garbaugh \$3,600.00 in all. He simply said that he would sell the property as quickly as he could and would then pay Garbaugh the full amount due him. They were not discussing the amount due from one to the other, but they were interested primarily in providing a means whereby Garbaugh could be assured that whatever was due him would be paid.

Apparently Garbaugh did not trust Dickens to the extent

of having an oral understanding about the matters concerned in Defendant's Exhibit 1. Either that or else he was unwilling to take the risk of relying upon the memories of himself and Dickens. We think it safe to infer from the facts that the payment of the \$3,600.00 would have been considered by Garrough to be quite as important an item as the matters which were reduced to writing. From Dickens's point of view it seems pertinent to inquire what should prompt him to sign Defendant's Exhibit 1, by virtue of which the only thing he was to get was a piece of heavily incumbered real estate, and at the same time orally acknowledge an indebtedness amounting to \$3,500.00 and of twenty years standing.

Elmer contradicted himself as to when, during the interview, the discussion about \$3,600.00 and \$300.00 took place. He admitted that he did not hear all of the conversation between the parties. He was engaged in formulating the terms of a rather comprehensive document and naturally his attention was directed to the performance of that task. If he did not hear all, what was said that he did not hear? What things were said which would be material in determining the understanding of the parties but were not heard by the witness, we cannot know.

From the foregoing it will be seen that the testimony of the sole witness in the case was uncertain, noncontradictory and in many respects highly improbable. In addition to this it fails to show the entire conversation out of which, it is claimed, arose the understanding that a certain amount was due

from Dickens to Carbaugh. The finding of the trial court was not warranted by the evidence.

By reason of the foregoing the judgment of the Circuit Court of Cook County is reversed and judgment entered here for the defendant.

REVERSED AND JUDGMENT HERE
FOR THE DEFENDANT.

HOLDOM, P.J. AND WILSON, J. CONCUR.

From records of the Court of Sessions, Glasgow, 1840-1841.
The defendant, James Smith, was found guilty of the same.

The defendant, James Smith, was found guilty of the same.
Court of Sessions, Glasgow, 1840-1841.

James Smith

James Smith, 1840-1841.

JOHN BURCZ,

Appellant,

v.

ROBERT PETERS, by his Next
Friend, Edward Peters,

Appellee.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

Opinion filed January 30, 1929

MR. JUSTICE WILSON delivered the opinion of the court.

The petitioner John Burcz filed his petition in the County Court of Cook County, praying that he be released from the custody of the sheriff under the Insolvent Debtors' Act.

From the facts it appears that Robert Peters, minor, by his next friend, recovered a judgment for \$500.00 in an action in case in the Superior Court against Burcz, defendant to that suit and petitioner here. The appearance of the defendant was entered in said cause and it appears to have been reached for trial but the defendant did not appear and defend. The original declaration consisted of five counts, four of which were dismissed before the cause proceeded to trial, leaving but one count, charging the defendant with wantonly, wilfully and maliciously running and operating a certain motor vehicle with intent to injure the plaintiff and that as a result thereof, it was caused to and did run into and against the plaintiff who was greatly injured.

Upon the hearing in the County Court, the petition was denied and the petitioner remanded to the sheriff of Cook

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County. From this judgment this appeal has been perfected.

Upon a reading of this single count of the declaration which was the only count submitted to the jury, it is apparent that malice was the gist of the action. This matter, having been settled in the proceeding in the Superior Court, became a matter of res adjudicata and the County Court properly dismissed the petition and remanded the petitioner to the custody of the sheriff. Where an inspection of the record conclusively establishes that the question of malice was settled in a former suit and determined by a judgment, such a judgment becomes an effectual bar as to any further dispute between the parties upon that issue. Jernberg v. Mix 199 Ill. 254.

For the reasons stated in this opinion the judgment of the County Court is affirmed.

JUDGMENT AFFIRMED.

HOLDOM, P.J. AND RYNER, J. CONCUR.

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HENRY BALDRIDGE,

Plaintiff in Error,

v.

LUCILIUS DRAKE and JOHN W. SOKLEY,

Defendants in Error.

ERROR TO

COURT OF APPEALS,

JURY TRIAL.

Opinion filed January 30, 1929

MR. JUSTICE WILSON delivered the opinion of the court.

The declaration filed in the cause charged that the plaintiff Baldridge was a person of good name and reputation in the community; that the defendants knowing the same and intending to injure the plaintiff, falsely and maliciously and without reasonable or probable cause by complaint in writing, charged the plaintiff with having wilfully and unlawfully, by menace, profane swearing, vulgar language and disorderly conduct, disturbed an assembly of people then and there meeting for the purpose of worshipping God, in violation of Paragraph 159, Chapter 38, Jchill's Revised Statutes of the State of Illinois; charged that a warrant issued and that plaintiff was arrested and that an examination was had before the court and the plaintiff was found not guilty and fully discharged and acquitted. To this declaration the defendants filed pleas of the general issue and special pleas to the effect that they had consulted counsel and were advised in the matter and that they signed an affidavit for the said warrant and also set up certain other special matters of defense. The section of the Criminal Code hereinbefore referred to provides as follows:

"159. Disturbing religious meeting.) § 58
Whoever, by menace, profane swearing, vulgar language, or any disorderly or unusual conduct, interrupts or disturbs any assembly of people met for the worship of God, shall be fined not exceeding \$100."

It appears from the facts that on or about February 19, 1936, there was a business meeting held on the premises of the Friendship Baptist Church, at which there were present 75 or 80 members; it appears further that the plaintiff Baldrige had formerly been a member of the congregation but had been expelled sometime before the meeting in question and it appears further that upon the date in question he had attended the meeting and that the defendant Drane, acting as chairman of the meeting, stated that he would entertain a motion to get out a warrant to have the plaintiff arrested. This motion was seconded and carried by a large majority of those present.

From the record it appears that nothing was said by Baldrige at the time and there is no evidence of profane language or disorderly conduct. The plaintiff was asked to leave, but did not go. About ten days after the meeting, the warrant upon which plaintiff was arrested issued and the plaintiff was taken into custody. At the end of plaintiff's case, on motion of defendants, the court instructed the jury to bring in a verdict of not guilty and upon this verdict judgment was entered and an appeal taken.

In order to sustain a verdict for malicious prosecution, there must appear first, the commencement of the criminal or civil proceeding; second, its legal causation by the present defendant against the plaintiff, who was defendant in the original proceeding; third, its bona fide termination in favor of the present plaintiff; fourth, the absence of probable cause for such

proceeding; fifth, presence of malice therein; and, sixth, damage conforming to legal standards resulting to the plaintiff. The first, second, third and sixth of these elements are admittedly proven in the present action. As to the absence of probable cause it may be stated that probable cause is a belief held in good faith by the prosecutor in the guilt of the accused, based upon circumstances sufficiently strong to induce the belief in the mind of a reasonably cautious person that the defendant in the prosecution was guilty of the particular offense charged. The proof of a want of probable cause must necessarily be of a negative character, and slight evidence, such as, in the absence of proof by the defendant to the contrary, would afford ground for an inference that there was a want of probable cause.

Glenn v. Lawrence, 280 Ill. 581.

Want of probable cause is not always capable of direct proof, but may be inferred from circumstances. In the case at bar it does not appear that the plaintiff had participated in any way at the meeting other than by his presence and the evidence would indicate that the meeting was not a meeting for the purpose of worshipping God, as provided in the statute, but was a business meeting and, consequently, the plaintiff would not be held to have violated the particular section upon which the warrant was predicated. The action of the congregation in voting in favor of the procuring of a warrant would have weight on the question of malice, but there is some evidence in the record, taken as a whole, which might indicate that there was considerable personal feeling between the plaintiff and the defendants which could, by giving it every reasonable intendment in favor of the plaintiff, be sufficient to support a verdict. We are not concerned with what the court might, or might not do on a motion for a new trial in the event there

was a verdict in favor of the plaintiff, and it is not the province of this court to weigh the evidence under the circumstances in this case. We are confronted, however, with the rule that on a motion to direct a verdict at the end of the plaintiff's case, a court of review will only consider whether there is any evidence which, if it stood alone, would be sufficient, so that a jury could, without acting unreasonably in the eye of the law find that the material averments of the declaration had been proven. Severinghaus Ptg. Co. v. Thomson, 341 Ill. App. 36; Hatch v. Royal League, 233 Ill. App. 598.

In view of the fact that this case is to be re-tried, we express no opinion in regard to the evidence, other than to say that in resolving all inferences and intendments in favor of the plaintiff's testimony, there was enough in the record to have required evidence upon the part of the defendant to rebut it. The motion to direct a verdict at the end of the plaintiff's case should not have been allowed and the granting of the same was error.

For the reasons expressed in this opinion, the judgment of the Superior Court of Cook County is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HOLDOM, F.J. AND RYEN, J. CONCUR.

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ROBERT E. HOGAN,

Appellee,

v.

JOSEPH F. BAUER,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed January 29, 1929

MR. JUSTICE WILSON delivered the opinion
of the court.

The statement and affidavit of claim filed in the Municipal Court by the plaintiff Robert E. Hogan, charged that the plaintiff was entitled to the possession of certain goods and chattels, namely, two bronze and gold candelabra of the value of \$75 each, and that the plaintiff had made demand for the same and that the defendant wholly refused to surrender and now unlawfully detains them. The affidavit of defense denies the unlawful detention of the goods in question and, for further plea, says that the plaintiff is barred by the Statute of Limitations from asserting his claim; further charges that he, the defendant, Joseph F. Bauer, is entitled to a lien on said goods by reason of certain repairs made upon said candelabra at the time and in connection with other goods left with the defendant and which said candelabra are now in the possession of the defendant.

The facts in the case show that the defendant Joseph F. Bauer was a jeweler engaged in the business of making and repairing jewelry; that about September, 1917, one Mrs. Reed left with him for repair a number of articles,

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among which were the candelabra in question. The facts further show that the total amount due on said articles for repair, amounted to \$73.75, and that in September, 1918, Mrs. Reed called at the place of business of the defendant and had a conversation with him, at which time she stated that she had sold the candelabra and wanted to find out what the charges were and said she would like to take them with her, together with a certain clock, which was also being repaired, stating that she would pay him as soon as she had sold the candelabra. The defendant refused to allow her to take the candelabra until he was paid for the work done on all the articles. According to the testimony of the defendant, Mrs. Reed then asked him to try and dispose of the candelabra and left them, together with the other goods, where they remained until on or about September, 1925, at which time the plaintiff Hogan appeared at the place of business of the defendant with his wife and Mrs. Reed and stated that he had paid Mrs. Reed for the candelabra and wanted possession of them.

The cause was tried by the court without a jury, resulting in a finding in favor of the plaintiff for possession of the candelabra, together with \$150 damages for the detention of the same and costs. Final judgment was entered upon this finding and it is from this judgment that this appeal is taken.

It is urged on behalf of the defendant that he is entitled to a lien upon all the property left in his possession for repair, including the articles in question, by reason of work performed on said articles and further that, if there

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was any conversion, it was as of September 1918, at which time he refused to deliver possession to Mrs. Reed, the then owner of the property.

The plaintiff claims to be the owner of said articles by reason of purchase from Mrs. Reed, although a reading of the record discloses the fact that the purchase, if made, must necessarily have been made without inspection of the articles. The right to a lien for services performed upon articles left, has been recognized as a common law right in some of the cases cited by counsel. See H. Meyer Boot & Shoe Mfg. Co. v. Ward, 68 Ill. App. 272; American Pine Apple Products Co. v. Chicago Job Press Co., 216 Ill. App. 362. Such a lien is clearly cognizable in equity, but not so well recognized at common law. In the case at bar, however, the acts of the parties, together with the conversation in September, 1918, would indicate an agreement between the parties, as a result of which the goods were to remain in the possession of the defendant until the bill for services on the entire collection of articles left with him for repair had been paid. This is borne out by the fact that after his refusal to turn them over to her on the ground that he would not do so until the bill for all the articles was paid, she attempted to arrange with him to sell the candelabra and continued to leave them in his possession for a period of approximately seven years. A lien may be created under such circumstances by express agreement or by conduct of the parties. Moreover, in September, 1918, the defendant refused to turn over the candelabra on demand and if there was any conversion of the property it was of that date and the

Statute of Limitations would have run against the action, brought as it was over seven years thereafter.

We have not been aided in our consideration of this case by any brief or argument on behalf of the plaintiff.

For the reasons stated in this opinion the judgment of the Municipal Court is reversed and judgment entered here for the defendant, together with the costs of this proceeding.

JUDGMENT REVERSED AND JUDGMENT HERE FOR DEFENDANT.

HOLDOM, P.J. AND RYNER, J. CONCUR.

SAM W. LEW,

Appellee,

v.

JOHN RAKLIOS,

Appellant.)

AL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed January 30, 1929

MR. JUSTICE WILSON delivered the opinion of the court.

The plaintiff below, Sam W. Lew, brought his action in the Municipal Court to recover rent at the rate of double the yearly value of certain premises claimed to have been held over wilfully by the defendant John Raklios after the expiration of a certain lease which the said Raklios had to said premises. The defendant pleaded that he did not withhold possession of said premises and upon a trial of the issues by the court without a jury, there was a finding by the court in favor of the plaintiff and damages assessed at the sum of \$1,050.00, upon which finding judgment was entered.

The facts briefly stated show that the defendant Raklios entered into a certain lease with the owners of the property known and described as 542 South State street, Chicago, Illinois, and opened a restaurant upon said premises. The lease was dated June 1, 1922, and expired on the last day of April, 1926. On January 1, 1926, the owners of the property made and executed a certain lease of the same premises to Sam W. Lew, plaintiff in this action, to take

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effect on the first day of May, 1926. Lew undertook to take possession of the premises on the first of May, but found Joseph and Max Silverberg in possession and using the premises for the purpose of holding auction sales. Demand was made for possession of the premises which was refused and, on May 13, 1926, a judgment was entered in the Municipal Court against the defendants, John Raklios, Joseph Silverberg and Max Silverberg, finding that the defendants in said forcible entry and detainer suit were holding possession unlawfully and that the plaintiff Lew in said proceeding was entitled to possession under and by virtue of his lease to said premises. In the case at bar the plaintiff sued the defendant Raklios as lessee in the prior lease for double the amount of rent for the months of April and May, 1926, in accordance with the provision of the Landlord and Tenant Act in force in this State. The defendant Raklios urges as ground for reversal of the judgment that the evidence is not sufficient to sustain the judgment. It is also urged in the course of the argument that Raklios had no notice to vacate, but, in view of the fact that the term had expired and his lease provided the waiving of notices of all kinds and character, we do not consider it necessary to discuss this point, other than to say that we do not regard it as having any force or effect.

At the trial the defendant attempted to show that he had assigned his lease to a certain William Rodes on or about June 7, 1922, and that he had paid no rent to the owner of the premises from that time on and that the Silverbergs had not paid him rent, but had paid directly to the owner and landlord. He denied further that he had been served with summons in the forcible entry and detainer suit

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and did not know of its existence. Plaintiff Lew, on the other hand, testified that he was present with the bailiff in the office of Raklios at the time he was served with summons in said suit. The lease from the owner of the premises to Raklios contained on the back an assignment of the lease to Rhodes and an acceptance of the assignment by the landlord, but these, in turn, appear to have been canceled by pencil marks being drawn through the assignment and acceptance.

The summons in the forcible entry and detainer case appears to have been returned by the officer as having been served personally upon the said Raklios. This fact, together with the testimony of Lew that he was personally present with the officer at the time that the summons was served, would indicate, to say the least, that Raklios was mistaken as to this particular fact and would tend to weaken his testimony in regard to other matters in issue. The introduction of the lease from the owner of the premises to Raklios; the failure of the defendant to appear and defend at the forcible entry and detainer proceeding and his refusal to acknowledge service of summons, together with the other facts and circumstances in the case, were sufficient to warrant the trial court in arriving at a finding in favor of the plaintiff.

This court will not disturb a judgment of a trial court unless that judgment is manifestly against the weight of the evidence and we are not aware that such is the fact in the case at bar. The trial court had an opportunity to hear and see the witnesses upon the stand and to observe their demeanor and conduct while testifying and was in a

better position to arrive at the truth concerning the facts than is a court of review.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HOLDOM, F.J. AND RYMER, J. CONCUR.

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LA SALLE STEEL COMPANY,
a corporation,
Plaintiff-Appellee,
v.
JOANNA E. DOWNES,
Defendant-Appellant.

APPEAL FROM

SUPERIOR COURT,
COCK COUNTY.

Opinion filed January 30, 1929

MR. JUSTICE WILSON delivered the opinion of the court.

The La Salle Steel Company, plaintiff, brought this action against Joanna E. Downes, defendant, in trespass on the case upon promises. The trial resulted in a verdict in favor of the plaintiff for the sum of \$1,950.00, upon which judgment was entered and an appeal prayed and allowed to this court.

The declaration consisted of two counts: The first count charged that the defendant had entered into a written guarantee with the plaintiff by which the defendant guaranteed the payment for goods sold and delivered by the plaintiff to The Motor Valve Company, a corporation; charged further that the said Motor Valve Company became indebted to the plaintiff in the amount of \$1,950.64, which it had failed to pay upon demand and which the said defendant had also refused to pay, although liable as guarantor for said amount. The second count consisted of the common counts.

The defendant filed five pleas: The first consisted of the general issue; the second plea admitted the guarantee and the purchase and sale of goods, but averred that there was a deficit in the quality and specifications of the goods to

the damage of The Motor Valve Company to the extent of \$2,000.00; the third plea averred that no goods were sold by the plaintiff to The Motor Valve Company because of or in reliance upon the guarantee or while it was in full force and effect; the fourth plea averred that on August 6, 1935, there was an account stated and arrived at, by which it was found there was due the plaintiff from The Motor Valve Company the sum of \$3949.83, and that upon the same date the defendant revoked and withdrew the guarantee and notified the plaintiff of such revocation; the fifth plea averred that on August 6, 1935, there was an account stated between the plaintiff and The Motor Valve Company, but that, subsequently, without the knowledge or consent of the defendant, the plaintiff and The Motor Valve Company, changed and altered the terms of such settlement and agreed upon different terms without the knowledge or consent of the defendant.

A general and special demurrer was interposed to the second, third, fourth, and fifth pleas, which was sustained. The cause proceeded to trial upon the declaration and the plea of the general issue.

It is urged as one of the grounds for reversal that the court erred in sustaining the demurrer to the special pleas, but we find no exception preserved to this ruling of the court in the abstract filed in the cause.

Moreover, in regard to the second plea, we find there was no offer of proof as to any defects in the quality and specifications of the goods; as to the third plea, the facts stated therein were provable under the plea of the general issue; as to the fourth plea, the court admitted testimony on

behalf of the defendant for the purpose of showing the revocation of the guarantee as of August 6, 1925. Under the facts charged in the fifth plea that, subsequently, and without the knowledge or consent of the defendant, the plaintiff and The Motor Valve Company changed and altered the terms of a certain settlement, it appears that the amount agreed upon was paid by the defendant and the plaintiff suffered no harm. Moreover, from the proof it is uncontradicted that the defendant was a director, as well as attorney for The Motor Valve Company and would, necessarily, be presumed to know and consent to what was being done in that regard.

Under the declaration and the plea of the general issue in this case, the plaintiff was required to prove all the facts necessary to make out a case entitling it to recover and, under her plea of the general issue, the defendant had the right to offer the same defense that The Motor Valve Company could have made if it had been personally present and defending. Counsel for defendant apparently agreed with this pronouncement of the law as in his brief he adopts and confirms this rule.

Quoting from the brief and argument for appellant, at page 23, he says:

"The guarantee sued upon, being a continuing guarantee, certainly entitled the defendant to make any defense which would have been open to the principal if it had been sued."

This rule in our opinion permitted the defendant, under the plea of the general issue, to offer in evidence facts in support of her second and third pleas. To the same effect see Benes v. Bankers Life Ins. Co., 282 Ill. 236.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the study. The next step is to collect data. This is done by the investigator who is responsible for the study. The next step is to analyze the data. This is done by the investigator who is responsible for the study. The next step is to interpret the results. This is done by the investigator who is responsible for the study. The next step is to draw conclusions. This is done by the investigator who is responsible for the study. The next step is to report the findings. This is done by the investigator who is responsible for the study. The next step is to discuss the implications. This is done by the investigator who is responsible for the study. The next step is to recommend further research. This is done by the investigator who is responsible for the study. The next step is to conclude the study. This is done by the investigator who is responsible for the study.

The sustaining of the demurrer to the fourth plea which, setting forth as it does that the guarantee had been revoked by the defendant, was not reversible error as the defendant was allowed to present fully her evidence in this regard for the consideration of the jury and was, therefore, in no way harmed by reason of said ruling. The Supreme Court in the case of Benes v. Bankers Life Ins. Co., already referred to in this opinion, says:

"Where a demurrer to such a plea, however, is sustained by the court on the ground that it amounts to the general issue or because the matter pleaded is admissible under the general issue, and opportunity is given the defendant to prove the matters under the general issue, he would have no cause of complaint at the overruling of the special plea, whether it amounted to the general issue or not."

The position taken by the defendant, namely, that the guarantee had been revoked, cast upon her the burden of proof to sustain her position in this regard. Harmon v. Callahan, 187 Ill. App. 312. Moreover, the defendant was given and accepted the opportunity of opening and closing the arguments to the jury and acquiesced in the same without objection.

From the facts it appears that the plaintiff was engaged in the business of manufacturing iron and steel and that among its customers was The Motor Valve Company, a corporation; that the plaintiff had been selling The Motor Valve Company for some time but that, on or about February 9, 1925, doubting the financial ability of The Motor Valve Company to pay for its purchases of steel, the plaintiff required a guarantee of payment and on that date the defendant executed her written guarantee binding herself unconditionally and continuously, as security for any purchases made by The Motor

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. The investigator must first determine the nature of the problem and the scope of the investigation. This is done by interviewing the parties involved and by reviewing the relevant documents. The investigator must also determine the objectives of the investigation and the methods to be used. The next step is the collection of evidence. This is done by the investigator who is assigned to the case. The investigator must first determine the sources of evidence and then collect the evidence. This is done by interviewing the parties involved and by reviewing the relevant documents. The next step is the analysis of the evidence. This is done by the investigator who is assigned to the case. The investigator must first determine the facts of the case and then analyze the evidence. This is done by interviewing the parties involved and by reviewing the relevant documents. The next step is the preparation of the report. This is done by the investigator who is assigned to the case. The investigator must first determine the findings of the investigation and then prepare the report. This is done by interviewing the parties involved and by reviewing the relevant documents. The final step is the presentation of the report. This is done by the investigator who is assigned to the case. The investigator must first determine the findings of the investigation and then present the report. This is done by interviewing the parties involved and by reviewing the relevant documents.

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Valve Company from the plaintiff. It appears further that the defendant was a substantial stockholder and director and attorney of The Motor Valve Company and that one of her sons was secretary and treasurer and also a director of the corporation, and that another of her sons was a director and stockholder.

It appears that the defendant kept closely in touch with the affairs of the company and testified that on August 6, 1925, she had a conversation with one Ladensohn, credit manager of the plaintiff. She testified that in this conversation she told him that she revoked the guarantee in so far as it applied to any further purchases from the La Salle Steel Company by The Motor Valve Company. She testified further that she could not pay the amount then due, nor could the company, but that if the company was given time, she was sure it could pay. This position of the defendant would indicate that she had no objection to an extension of time for the payment of the amount due as charged in the fifth plea. She also testified that any future sales to The Motor Valve Company should be made C. O. D. She was supported in this testimony by one Armstrong, and her testimony in regard to the revocation of the guarantee and the future sales policy was denied by Ladensohn on behalf of the plaintiff.

One of the grounds for reversal relied upon by the defendant is that the court erred in refusing to admit in evidence certain communications passing between the La Salle Steel Company and The Motor Valve Company on the ground that these communications supported the truth of the defendant's position, viz, that there had been a revocation on August 6, 1925, and that thereafter the sales were made C. O. D.

It is not contradicted that, on or about that date, an account stated was arrived at, as a result of which the amount then due, amounting to approximately \$3,949.83, was paid by The Motor Valve Company by the giving of notes by The Motor Valve Company for that amount, payable from time to time, and which notes were, in fact, paid as they became due.

From our reading of the evidence it appears that the offer of these particular documents was for the purpose of showing that such an arrangement had been entered into by and between The Motor Valve Company and the plaintiff, but not for the purpose as claimed of corroborating the testimony of the defendant, namely, that there had been a revocation of the guarantee on or about August 6, 1925. Conceding, however, that the offer was for this purpose, we have examined the correspondence offered in evidence on behalf of the defendant and find there is nothing contained therein of a corroborative character. By this correspondence it is apparent that The Motor Valve Company was undertaking to pay up the back indebtedness of \$3,949.83, which was the balance found due August 6, 1925. It is not disputed that this amount was found due and that The Motor Valve Company was to immediately take steps to take care of it. We find nothing in the correspondence to the effect that there was any new agreement in regard to future business contained in the correspondence.

A considerable part of the brief of the defendant is devoted to the remarks and conduct of the trial court which, it is claimed, were prejudicial to the rights of the defendant. The principal contention appears to have arisen during an argument between the court and counsel for the defendant, as to

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the admissibility of certain oral testimony offered on behalf of the defendant for the purpose of showing a revocation of the written guarantee. The court appeared to be strongly of the opinion that a written guarantee could not be abrogated by an oral revocation, and so stated. In the course of the argument, counsel for the defendant attempted to cite various authorities to the court as sustaining his position, which the court refused to accept as the law. Moreover, the court frankly stated that he did not know the law and ultimately admitted the evidence of the defendant to the effect that she had orally terminated the written guarantee. The jury was instructed that if such was the fact they should find for the defendant. A number of other statements of the court are contained in the brief filed by counsel for the defendant and urged as ground for reversal because of their prejudicial effect upon the rights of the defendant. None of these however, reflected on the testimony of any witness. We find, however, that there were no objections nor exceptions taken to any of the remarks of the court. In order to base an assignment of error upon alleged improper remarks of the court, it must appear from the record that objections were made and exceptions taken at the time. Public Service Co. v. Leatherbee, 311 Ill. 505.

From an examination of the authorities we are of the opinion that the testimony relative to the oral cancellation of the written guarantee was properly admitted. National Liberty Ins. Co. of America v. Meyer, et al, 31 Ohio appeals 385; First National Bank of Antigo v. Wunderlich, 130 N. W. (Wis) 98.

For the reasons stated in this opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HOLDOM, P.J. AND RYNER, J. CONCUR.

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32815

HENRY BRELIE,
Appellee,

vs.

DAVID SAUL KLAFTER and
AMANDA E. KLAFTER,
Appellants.

251 I.A. 614'

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendants to recover \$22,858.91, being earnest money he had paid the defendants on account of the purchase of 650.5 acres of Florida land, plaintiff's theory of the case being that the title to the land was defective and therefore he was entitled to the return of his money. At the close of the evidence there was a directed verdict in favor of the plaintiff for the amount of his claim. Judgment was entered on the verdict and defendants appeal.

The record discloses that on October 31, 1925, plaintiff and defendants entered into a written contract whereby the defendants agreed to sell and the plaintiff agreed to purchase 650.5 acres of land located in Florida at a price to be at the rate of \$325 an acre. The contract provided that:

"If the title to any parcel of this land should prove defective and the sellers cannot cure the defects, such acreage shall be deducted and eliminated from the contract and the sellers agree to sell the balance at the price and upon the terms stated. It is understood, however, that should any part of the premises fronting on route three be affected by such defects so that sellers are unable to furnish good title thereto, the purchaser shall be released from any obligations under the terms of this contract and any amount or amounts paid to the sellers shall be returned to the purchaser."

The evidence shows that after the execution of the contract Florida counsel for the plaintiff made an examination of the title to the land and rendered written opinions raising a number of objections. These opinions were delivered to defendants'

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Florida counsel, who prepared an opinion answering the objections to the effect that they were immaterial and that the title of the defendants was good.

The 650.5 acres of land were located in four adjoining sections but were in a number of different parcels. But 75 acres of the land had "a frontage" on route three mentioned in the contract. The legal description of the 75 acres is: "W $\frac{1}{2}$ of the SE $\frac{1}{4}$ except the south 2.27 chains of the east 5.51 chains thereof in section 19, in Township 16 South, Range 30 East." So that the only question involved in the instant case is: Was the title to this 75 acres defective? If it was, plaintiff was entitled to the return of his money and the judgment must therefore be affirmed. If the title was not defective the judgment must be reversed. If the title to any other parcel or tract was defective it might, under the terms of the contract, be eliminated.

A preliminary procedural question is raised by the defendants. The point made is that, since plaintiff's suit was based on the breach of a special contract, special counts were required; and that since the declaration consisted of but the common counts the judgment must be reversed. On the record before us the contention of the defendants is unavailing, because if plaintiff's contention is sustained - namely, that he had paid to the defendants more than \$22,000 and that, since the title to the 75 acres is materially defective, he is entitled to the return of the money - the defendants then have money belonging to the plaintiff which in equity and good conscience they ought not to retain; and in this situation the common counts are sufficient. Law v. Uhrlaub, 104 Ill. App. 263; Arnold v. Dodson, 272 Ill. 377; Stewart v. Brady, 300 Ill. 425-445.

Plaintiff contends that there were three defects in the title to the 75 acres: (1) reservations for roads; (2) that the

abstract of title shows that the owners of the 75 acres conveyed the same by warranty deed in 1886, and that since this deed contained no words of limitation after the grantee's name, such as heirs and assigns, it conveyed but a life estate and therefore the title to the fee was in the heirs of such grantor; and (3) that a sale of 10 acres of the 75 acres was made through the County court of the proper county in Florida, but that no additional bond, as required by the law of that state, was given and therefore the proceeding was void.

(1) It appears from the record that there was an east and west road at the south end of the 75 acres which had been used for many years by the public, and it seems to be conceded that a strip of land used as a part of this road, being 30 feet wide by 300 feet in length or 9,000 square feet, was involved; that no reference was made to this strip in the contract, and plaintiff contends that the title to the 75 acres is therefore materially defective. On the other hand, defendants' contention is that it cannot be said that the south end of the 75 acre tract fronts on route three within the meaning of the contract. The evidence shows that route three extends diagonally in a northwesterly and southeasterly direction across what would be the ten acres located in the northeast corner of the 75 acre tract, and that this was a new state road just being opened. The argument in support of this contention is, in substance, that the 75 acre tract is not one tract because the abstracts of title show that there is a 10 acre tract across the south end of the property, etc. We think the contention of the defendants cannot be sustained. The contract describes the 75 acre tract as one entire tract, and we think that under the terms of the contract the 75 acres must be held to front on route three and that this was the intention of the parties; but we are also of the opinion that the

contention of plaintiff that this reservation for a road renders the title materially defective is untenable. In our opinion, this objection is entirely frivolous and without substance.

The evidence shows that this road at the south end of the 75 acres is 1800 feet from route three at the nearest point. It further appears that this road at the south end of the 75 acre tract is a real benefit to the property. But counsel for the plaintiff cite Bowes v. Vaux, 43 Ont. Law Rep. 521, where it was held that there was a failure of title to a portion of land which constituted about 1 per cent of the area sold. In the instant case the 75 acres contained 3,267,000 square feet and the strip used as a part of the road contained 9,000 square feet or but .00275 per cent of the land involved. To give substance to this objection and hold the title materially defective would, in our opinion, make a mockery of the courts. Moreover, the evidence shows that the head of the firm of Florida lawyers who rendered the opinion of title to the property, owned this 75 acres shortly before the transaction involved, and that he conveyed it by warranty deed and now holds a mortgage on the same property to secure a part of the purchase price. Furthermore, in their opinion of title the attorneys did not point out this as a defect in the title, but merely called attention to it because, after pointing out a certain objection which they numbered "Twelfth," they continued and said:

"We call your attention to the fact that the deed shown in Entry No. 14 of the abstract reserves a strip thirty (30) feet wide on the South side for a road."

From a consideration of all the evidence in the record it is obvious that this objection is entirely frivolous and without merit.

(2) The second defect claimed by plaintiff in the title to this 75 acre tract is that on April 4, 1886, the then

owners of 10 acres of the 75 acres conveyed the 10 acres by warranty deed, but that there were no words of limitation after the grantee's name, so that the title in fee simple was not conveyed by that transfer, but only a life estate. The abstract of title introduced in evidence and which is all that we have before us on this question is as follows:

<p>"No. 16 Isaac S. Mahan and wife Jane H. to Francis P. Walker.</p>	<p>Book X, page 439. Dated April 4, 1886. Filed April 10, 1886. Warranty. Consideration \$300. Conveys SW$\frac{1}{4}$ of SW$\frac{1}{4}$ of S$\frac{1}{2}$ Section 19-16-34, containing 10 acres. Subject to taxes for 1886. See note for this deed. H. B. C. Not to lien."</p>
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It will be noted that it does not appear from this abstract what words appeared after the name of the grantee, Walker. The abstract of title simply shows that Mahan and wife conveyed the 10 acres to Walker by warranty deed, and we must therefore assume that the warranty deed was in proper form to convey the entire title to the premises. That would certainly be the interpretation placed upon such an abstract of title in this state, and we think this is not changed by the addition appearing in the abstract of the following: "See note for this deed. H. B. C. Not to lien."

But we are further of the opinion that a defect in this deed, if any, was cured by an act of the legislature of Florida, which is the contention of the defendants in the instant case, and this was the written opinion given by the attorney in Florida when he rendered his opinion answering the objection in question. This act was passed in 1925 and is designated in the record as "Section 10170 of the Acts of 1925," passed by the Florida legislature to validate deeds conveying the fee simple title. It provides for the validation of deeds after twenty years. Said section is as follows:

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"After the lapse of twenty years (20) from the recording of any deed, or the probate of any will purporting to convey lands, no person shall assert any claim to said lands as against the claimants under such deed or will or their successors in title.

"After the lapse of twenty years all such deeds or wills shall be deemed valid and effectual for conveying the lands therein described as against all persons who have not asserted by competent record title an adverse claim.

"Any person whose rights are adversely affected by this chapter will have six months within which to institute suit to protect such rights, and the chapter shall not affect pending litigation."

In the instant case the deed in question was made in April, 1886 - forty-three years ago - and so far as the record discloses no claim has been made that this deed did not convey ^{the} title in fee. On the contrary, the record shows that shortly before the contract in question was made eminent counsel in Florida conveyed this same property by warranty deed. We think there was no substantial defect in the title in this respect.

(3) The claim that the title to the 75 acres was defective because, when 10 acres of it was sold in the County court in Florida in 1891, the administrator or commissioner did not give an additional bond, is, we think, unsound. Counsel for plaintiff has cited cases from other states, not including Florida or Illinois, which seem to hold that the failure of an administrator to give an additional bond, where the statute requires one, renders the sale of real estate void. Whatever may be the particular wording of the statutes in those states, we think that we would not be warranted in holding that under the statute of Illinois (sec. 7, chap. 3, Cahill's Stat.) which requires an administrator to give an additional bond when he is to sell real estate and when he fails to do so and the property is afterwards sold in the Probate court and the proceeds properly distributed, that such sale would be void. The only purpose of the bond is to see that the administrator accounts for the money obtained from the sale. In the instant case, it is

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4. $\frac{d}{dt} \left(\frac{1}{2} m v^2 \right) = \frac{d}{dt} \left(\frac{1}{2} m \dot{r}^2 \right) = m \dot{r} \ddot{r}$

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Page 97 Date 7-10-78 File # 62-108710-1 105871200

THIS CASE ORIGINATED IN THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA, AND IS NOW BEFORE THE COURT FOR APPEAL.

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1. 2011年12月1日，甲公司以每股10元的价格购入乙公司普通股股票1000股，作为长期股权投资，并采用成本法核算。2012年12月31日，乙公司宣告发放现金股利10000元，甲公司应确认投资收益10000元。

1962年10月1日 星期日 晴 10月1日 星期日 晴

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Page 1 of 1

not appear whether the administrator or commissioner appointed by the Florida court gave additional bond. The abstract of title is silent in this regard. It shows that in January, 1891, a petition was filed in the Estate of Eliza Davis, deceased, in the Florida court showing debts of \$103.78 and praying that real estate be sold to pay such debts; that on February 2, 1891, an order was entered directing the sale of 10 acres of the 75 acres in question and appointing Alfred Howard commissioner to make the sale; that on March 19, 1891, Howard reported that he had sold the property for \$200. So far as the record discloses the \$200 was used in the payment of debts of \$103.78, and we must presume, in the absence of any evidence to the contrary, that the court officer did his duty in this respect. We think it would be going entirely too far to hold that the proceedings in the County court of Florida were void, even if we should assume that the administrator or commissioner did not file the additional bond. We think this objection is also without merit and that the title to the 75 acres is good.

It follows that the judgment of the Superior court of Cook county must be reversed but, since there is no dispute as to the facts, it will not be necessary to remand the cause.

The judgment of the Superior court of Cook county is reversed.

REVEREND.

McSurely, J., concurs.

Matchett, J., dissents.

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE SUPPLEMENTAL OPINION.

Additional Opinion rendered on motion of plaintiff to correct the abstract.

Since the filing of the foregoing opinion plaintiff has filed his motion to correct the printed abstract so that it will correspond with the record. On page 5 of the opinion we quoted from the abstract of the record that part of the abstract of title made by the Volusia County Abstract Investment and Title Insurance Company, of Florida, showing the chain of title to the land in question. After quoting from the abstract of title which shows a conveyance from Isaac S. Mahan and wife, Jane B., to Francis T. Walker, we also quoted the following:

"See note for this deed. R.E.C.
Not to Lien."

The motion ~~now~~ is to strike out the word "lien" and insert in lieu thereof the word "heirs."

Upon an examination of the record we find that there was introduced in evidence a printed abstract of the title to the land made by the Florida company following which the words above quoted appear written in pencil; and it was conceded by counsel, who appeared before us on this motion, that such words were in the handwriting of one of plaintiff's counsel.

It was further agreed that such counsel obtained the information from the abstract of title prepared by the Florida Company and the original abstract was submitted to us on this motion. Upon examination of this abstract concerning the conveyance above referred to, we find that a part of the abstract of title is printed and part typewritten. We also find that there are a number of notes written in pencil on the abstract. Such penciled memoranda are as follows:

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Figure 1

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"Granting clause? Convey & warrant;
 Signature of wife? Jane H.; (Sept. Exam. O. K.);
 Not to heirs."

All of these pencil memoranda are written diagonally across the abstract of title while the printed and typewritten parts are horizontal. Following the memoranda above quoted also in pencil is the following: "See notes for this deed. R.E.C."

We are not advised as to who wrote the pencil memoranda above quoted, nor what the source of information, if any, was that warranted the writing of these notes.

Throughout the abstract of title which consists of several pages, we find similar pencil memoranda written apparently by various persons, all of which are obviously no part of the abstract of title and, of course, are of no probative value.

We write this supplemental opinion to show as near as may be the facts in the case as disclosed by the record.

The motion of the plaintiff will be allowed.

McSurely and Hatchett, JJ., concur.

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THESE ARE THE

REMARKS OF THE

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OF THE UNITED STATES

PERCIVAL B. COFFIN, Administrator
of the Estate of Henry F. McWilliams,
Sr., Deceased,

Appellee,

vs.

CITY OF CHICAGO, a Municipal Corporation,
et al.,

Defendants.

On Appeal of CITY OF CHICAGO,
Appellant.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR

DELIVERED THE OPINION OF THE COURT.

Percival B. Coffin as administrator of the estate of Henry F. McWilliams, Sr., deceased, brought an action to recover damages for the wrongful death of the deceased, against the City of Chicago, a municipal corporation, Linkamp & Company, a corporation, Louis C. Krueger and S. L. Dering. At the close of plaintiff's case the suit was dismissed on plaintiff's motion as to defendant Dering. At the close of all the evidence the case was submitted to the jury who found the three remaining defendants guilty and assessed plaintiff's damages at \$850. Judgment was entered on the verdict and each of the defendants prayed and was allowed an appeal to this court, but the appeal has been perfected only by the City of Chicago, hereinafter referred to as the defendant.

The record discloses that at about 1:30 o'clock a. m., on March 21, 1926, S. L. Dering, one of the defendants, the deceased and two women friends were driving south on Western avenue near 82nd street, when the automobile in which they were riding collided with a building which was then being moved and which was in the roadway of the street; that as a result of the collision McWilliams lost his life. He left six surviving his

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widow and two minor children.

The evidence shows that the defendant Hinkamp & Company owned a building located at about 81st street and Western avenue and had employed the defendant Krueger to move it to about 83rd street and Western avenue. Western avenue is a main north and south thoroughfare having two paved roadways, the west or south-bound roadway being about 25 feet in width and the east or north-bound roadway about the same width. There was a strip of about 18 feet between these two roadways which was not paved. It further appears from the evidence that Krueger began to move the house about March 17, 1926, moving it out into the south-bound roadway on Western avenue. The house was placed upon rollers and certain beams underneath it. On March 18th the City stopped the moving of the house because it had issued no proper permit. Afterwards a permit was obtained and the moving of the house south on the west roadway proceeded. At the time of the accident the house was standing between 82nd and 83rd streets in the west roadway of Western avenue and was about four feet above the level of the street. The beams under the house extended a little east and west of the house. Two lights were on the north side of the building, but the evidence all shows that they were very dim. The street was not lighted at the place in question.

The evidence further tends to show that Dering was driving the automobile and the deceased and one of the women were sitting in the back seat; that they were traveling about 25 miles an hour; that when Dering saw the house he attempted to turn to the left and slowed down but was unable to bring the machine to a stop, and the rear end of the machine skidded into the northeast corner of the house, injuring the deceased and the woman in the back seat so that they both died.

The original declaration charged that at the time in

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question the building was in Western avenue "near to the intersection of said Western avenue and 83rd street." On the trial the words "Eighty-third street" were stricken out and the words "Eighty-second street" were inserted in lieu thereof. This was done on motion of the plaintiff. To the declaration as amended the City interposed a plea of the statute of limitations and plaintiff's demurrer to this was sustained. The City contends that this was error, but we cannot concur in this contention. Both the original and the amended declaration named the same locality, not two different localities, as the defendant contends. The amendment did not state a different cause of action and therefore the ruling of the trial court was correct.

A further contention made by the defendant is that there was a fatal variance between the allegations of the declaration and the proof adduced, in that the declaration alleged that the automobile in which the deceased was riding ran into and against a building, while the proof showed that the automobile ran into and against a wooden beam which was underneath the building. There is no merit in this contention. The beam was under the house, and there is evidence in the record that the automobile was underneath the house immediately after the accident. The argument of the defendant in this respect is hypercritical and without merit.

The defendant further contends that the court erred in not directing a verdict in its favor at the close of the evidence because the deceased was guilty of contributory negligence as a matter of law. The evidence shows that the accident occurred in the nighttime, at about 1.30 a. m.; that it was dark and rather foggy; that the deceased was riding in the back seat. Just what defendant contends deceased should have done is not disclosed by the record nor in defendant's briefs. The negligence

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of the driver, if any, cannot be imputed to the deceased. Hazel v. Hoopston-Danville Bus Co., 310 Ill. 33. The court left the question of the negligence of the deceased, if any, to the jury, and we think properly so. Hoffman v. Yellow Cab Co., 238 Ill. App. 269.

A further point is made that the verdict and judgment are against the manifest weight of the evidence. The argument seems to be that the testimony of Dering, who was driving the automobile and who was the only occurrence witness who testified, is inherently improbable because he testified that he was driving about 25 miles an hour, saw the lights on the house when he was 65 feet away from it, and then slowed down to ten or fifteen miles an hour. Other witnesses testified who had driven over Western Avenue on the night of the accident, but we think it unnecessary to analyze their testimony because we are of the opinion that the jury was warranted in finding the City of Chicago guilty of negligence. The rule of law is well established that a municipal corporation is required by law to exercise ordinary care to keep its streets in a reasonably safe condition for persons who are using them and who are in the exercise of ordinary care for their own safety. City of Chicago v. Fowler, 60 Ill. 322; Brennan v. City of Streator, 256 Ill. 468. We think the evidence warrants the finding of the jury to the effect that the house in the roadway of the street, upon which house there were but two dim lights, created an extremely dangerous condition, and that the City knew of this fact. In these circumstances we are of the opinion that any other verdict would not be justified under the law and the evidence.

Further complaint is made that the court admitted over the defendant's objection certain ordinances of the City of Chicago, and in this connection counsel for the defendant says that the ordinances probably were competent evidence against the other defendants, but that the court should have limited the

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evidence to these other defendants. When the ordinances were offered a general objection was made. No point was raised by counsel that these ordinances should be limited to the defendants other than the City of Chicago. Furthermore, the City in putting in its own defense offered in evidence ordinances relating to a similar subject matter. We think the point is not properly before us, but, in any event, there is no merit in the contention.

Complaint is made to the giving, at plaintiff's request, of instructions 7, 9, and 13. By instruction 7 the jury were told that if they believed from a preponderance of the evidence that the defendants were guilty as charged in the declaration or some count thereof, and if they further believed that the driver of the automobile was guilty of negligence which contributed to bring about the injury to the deceased, the negligence of the driver would not relieve the defendants, provided the jury believed that the deceased was in the exercise of due care for his own safety. We think this instruction was entirely proper, and under the evidence whether the deceased was in the exercise of due care for his own safety was a question for the jury.

Instruction 9 stated what plaintiff had alleged in the fourth count of his declaration, copying substantially the allegations of this count. The instruction covers about a page and a half of the printed abstract, and after it sets out the allegations of the declaration continues and tells the jury that if they find from the preponderance of the evidence that the plaintiff has proved his case as alleged in that count, then it should find a verdict in plaintiff's favor. Instruction 13 is substantially the same except that it applies to the fifth count of the declaration. In our opinion, instructions of this kind ought not to be given in any case. Instead of enlightening they only tend to confuse the jury. Similar instructions were condemned in Reivitz v. Chicago Rapid

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Transit Co., 327 Ill. 207, where the court said, page 212:

"From the reading of several pages of instructions of this type, involving a statement of all the detailed allegations, the jury may get the impression that the court is, in fact, saying what has been proven. Being unaccustomed to the language generally used by common law pleaders, the jury, listening to a long recitation, with an occasional word to the effect that the plaintiff has alleged thus and so, may easily become confused."

But the court refused to reverse the judgment in that case on account of the instructions, stating, that the issue had been made clear in other instructions. If we were of the opinion, in the instant case, that the question of liability was a close one, we would not hesitate to reverse it on account of instructions numbers 9 and 13; but we think the facts were not at all complicated and there was little dispute in the evidence. Under these circumstances we think that the jury was not misled or confused to the prejudice of the defendant.

Defendant also contends that the court erred in refusing to give instructions numbers 10, 11, 12, 13, 15, 16 and 17 requested by it. By instructions 10, 11, 12 and 17, it was sought to have the jury told what constituted negligence. Without stopping to analyze these four instructions, we are clearly of the opinion that each of them was wrong and the court properly refused them. Refused instruction 13 was abstract in form and therefore it was not error to refuse to give it. Moreover, we think it was properly refused because it was not charged in the declaration that the City was negligent in not lighting the street in the place in question. By refused instruction 15 defendant sought to tell the jury that if the automobile struck the timber underneath the house and not the house, its verdict should be for the defendant. We think there is no merit in this contention and that the instruction was properly refused. The proposition contained in refused instruction 16 was covered by other instructions, so that it was not error to refuse this offered instruction.

Transmittal

Enclosed for the
Director, Bureau of
Recreation
and
Amusement

San Francisco, California

Dear Sir: I have the honor to
acknowledge the receipt of your
letter of the 11th inst. and
in reply to inform you that
the same has been forwarded
to the proper authorities
for their consideration.

I am, Sir, very respectfully,
Yours very truly,
[Signature]
[Title]
[Address]
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[Faint, mostly illegible text in the left margin, possibly bleed-through from the reverse side of the page.]

From a consideration of the entire record before us we are of the opinion that the defendant had a fair trial and that no error occurred upon the trial to warrant us in disturbing the judgment. The judgment of the Circuit court of Cook county is therefore affirmed.

AFFIRMED.

McSurely, J., concurs.

Matchett, J., dissenting: I think the character of the instructions Nos. 9 and 13 requires a reversal.

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THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

E. W. DAMON,
Plaintiff in Error.

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ERRON TO MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By leave of court C. H. Campbell filed a sworn petition setting up that there were two proceedings pending in the Municipal court against E. E. Mechelke, one in which Mechelke was charged with obtaining money under false pretences and the other charging Mechelke with the crime of perjury; that while these two cases were pending the defendant and other parties conspired to intimidate the petitioner so that she would drop the prosecution of the two cases against Mechelke. The prayer of the petition was that an order of court be entered requiring Damon to show cause why he should not be punished for contempt of court.

Defendant Damon was ordered to answer the petition, but he failed to do so, apparently for the reason that he had from time to time changed counsel. On July 25, 1928, the matter came on for hearing, at which time Damon was represented by counsel who had recently been retained. Counsel asked that the matter be continued to give him an opportunity to prepare and file a written answer. The court refused to grant the continuance on the ground that the defendant Damon had already been given a number of continuances but stated that he would permit Damon to give his version of the matter orally. This was agreed to by Damon's counsel.

C. H. Campbell was then called and testified on behalf of The People. Her testimony tended to prove the allegations

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of the petition. The People then called Helen Hauer, who refused to testify on the ground that her testimony might incriminate her. The court then, over defendant's objection, permitted counsel for The People to read from a transcript of testimony given by Helen Hauer in a contempt proceeding brought against Mechelke growing out of the same subject matter.

Damon, the defendant, then testified on his own behalf. His testimony was to the effect that he had been a private detective and had a number of times been employed by an attorney, Lane, in divorce matters; that Lane had called him up and employed him in connection with the matter in controversy. Damon further testified that he had no knowledge of any proceedings then pending in the Municipal court against Mechelke, and understood that what he was to do was to obtain evidence for Lane to be used in a divorce proceeding.

The defendant was found guilty and sentenced to four months in the county jail.

While the method pursued in the instant proceeding was unusual, yet we think that the sworn testimony of the defendant ought to be given the same effect as if he had filed his sworn answer, which is the ordinary course pursued. It is the settled law that, where a proceeding for contempt is instituted for acts committed out of the presence of the court, the sworn answer of the defendant is conclusive and if he has purged himself of the charge made against him by his answer, he is entitled to be discharged, being subject to indictment for perjury should the answer be false. People v. McDonald 314 Ill. 568. In the instant case the defendant was charged with conspiracy to obstruct the administration of justice in endeavoring to prevent the prosecution of the two cases brought in the Municipal court against Mechelke. Damon testified that he had no knowledge nor notice of any kind that any proceedings were pending at the

time he did the acts charged against him in the petition. In these circumstances we think he was entitled to his discharge and if it should develop that his sworn testimony was false, he may be indicted for perjury. Moreover, if what Damon did tended to obstruct the administration of justice he could be prosecuted criminally.

From what we have said it follows that the judgment of the municipal court must be and it is reversed.

REVERSED.

McSurely and Katchett, JJ., concur.

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WILLIAM JAEKEL,
Appellant.

vs.

MAURICE V. H. PUCKEY et al.,
Appellees.

2217A. 614⁴
APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Complainant, the owner of lot 8 in a certain subdivision, on behalf of himself and other property owners filed a bill seeking to enjoin the defendant, who was the owner of lot 9 which adjoins complainant's lot, from constructing a 13-apartment building on lot 9. The master took the evidence made by his report and recommended that the bill be dismissed for want of equity. The report was approved by the Chancellor and a decree entered dismissing the bill for want of equity, and this appeal followed.

The record discloses that Catherine C. Touhy on January 24, 1911, was the owner of all the land in the block facing north on Bryan avenue, now Jarvis avenue, between North Clark street on the west and Forest street, now Paulina street, on the east. On February 1, 1911, she filed her plat dividing the property into lots and alleys. Three lots faced on Clark, which was a business street, and twelve faced on Jarvis avenue. Two of the lots that faced on Jarvis avenue had a frontage of 34½ feet each; two of 40 feet each, and 8 of 50 feet each; the depth of the lots facing on Jarvis avenue was about 150 feet. There was a building line extending across all of the lots fronting on Jarvis avenue 30 feet from the north end of the lots.

April 23, 1912, Catherine C. Touhy conveyed lot 8 by warranty deed to Boaz C. Gelder. The deed was subject to certain building line restrictions and to the following: "Said Gelder hereby agrees to erect no building upon said lot costing

less than \$4,000 and for the use of a private residence to be occupied by one family only." On September 14, 1912, Gelder and wife conveyed the property by warranty deed to Rudolf Baumann and wife. The conveyance was made "subject to building line and building restrictions of record." February 28, 1920, Baumann conveyed lot 8 to complainants, William Jaekel and wife. The conveyance was "subject to restrictions contained in warranty deed from Catherine C. Touhy and husband to Amy Van Creanenbroeck. *** Also subject to agreement in the warranty deed *** from Catherine C. Touhy *** to Gelder," and also subject to building line of 30 feet shown on the plat of the subdivision.

On May 10, 1911, Catherine C. Touhy conveyed lot 9 by warranty deed to Amy Van Creanenbroeck. The deed contained the following: "Also subject to the following restrictions. Said Van Creanenbroeck agrees to erect a residence upon said lot 9 costing not less than \$4,000 and said Touhy hereby agrees not to erect any building except barn in rear of lots, upon lots 8 and 10 adjoining said nine except for residence purposes. Also subject to building line of 30 feet on Bryan (Jarvis) avenue and to building restrictions of record." Afterwards the defendant, Puckey, became the owner of lot 9 through mesne conveyances, the deed to him being dated April 28, 1927. This conveyance was made subject to "a building line of 30 feet and to restrictions contained in warranty deed from Catherine C. Touhy and husband to Amy Van Creanenbroeck." Afterwards Catherine C. Touhy conveyed lots 10, 11, 12 and 13.

The deed conveying the west four feet of lot 10 contained the following: "This conveyance is made subject to the agreement of the said Reiter (grantee) not to erect or cause to be erected any building upon said premises described costing less than Four Thousand Dollars (\$4,000)." And a further provision was that the grantors, Catherine C. Touhy and husband (who then owned the eas

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10 feet of lot 10 and all of lots 11, 12 and 13) would not "build or cause to be built or permit or allow any of their grantees or assigns to build or cause to be built on any of said lots *** any building for other than private residence purposes, meaning thereby that no flat building or buildings, apartment or apartments shall be built or placed thereon but only such building or buildings as is or are commonly and customarily used for and as a private residence or a single family."

Afterwards Catherine C. Touhy conveyed the east 10 feet of lot 10 and all of lots 11, 12 and 13 upon similar conditions. Lots 14 and 15 have not been conveyed by Mrs. Touhy or her heirs or devisees and they remain vacant.

Lot 7, which adjoins lot 8 on the west, was conveyed by Mrs. Touhy and her husband May 8, 1911, to Ella Carlson. The deed contained the following, also subject to the following restrictions: "Said Carlson agrees for the period of 15 years not to erect or cause to be erected any building *** except for residence purposes or a two-family residence to be not more than two stories high **** and to cost not less than \$4,500."

On April 28, 1913, Mrs. Touhy and husband conveyed lot 4 and the west 2½ feet of lot 5 to Rose Steiner subject to the following: "It is part of the consideration for the premises herein described, that said Steiner or her assigns agree to erect no building on said premises except for residence, flats or apartment purposes."

The evidence shows that at the time of the several conveyances by Mrs. Touhy of the lots fronting on Jarvis avenue, the property was vacant; that after such conveyances and at the time of the trial the evidence showed that lots 4 and 5 were each improved by a two-story brick building, each building containing two apartments. These buildings were constructed about 1914.

That lot 7 is improved with a two-family residence erected in 1911. That private residences for one family have been erected on each of lots 8, 10, 11, 12 and 13. That these residences are two-story in height, some of the bungalow type and that some of these buildings cost about \$20,000.

Complainant contends that an injunction should have been awarded restraining the erection of the apartment building on lot 9 which is to be three stories in height and is to contain 12 apartments to be occupied by 12 different families and one apartment in the basement for the janitor, because it is said the construction of such an apartment building is violative of the provision in the deed made by Mrs. Touhy and her husband of lot 9 to Amy Van Crensenbroeck, and that to permit the erection of such an apartment building would violate similar provisions contained in the deed conveying the lots east of lot 9, namely, lots 10, 11, 12 and 13. and on which lots residences have been constructed in accordance with the conditions mentioned in the respective deeds.

On the other hand, the defendants contend that the provision in the deed from Mrs. Touhy to Amy Vancrenbroeck does not prohibit the erection of an apartment building on lot 9; and further that in any event the injunction ought not to be awarded because since the conveyance of the lots by Mrs. Touhy the neighborhood has changed, and because Mrs. Touhy in conveying other lots on Jarvis avenue permitted the construction of apartment buildings.

In the case of Hutchinson v. Ulrich, 145 Ill. 336, it was sought to enjoin the construction of an apartment building on the ground that to do so would violate the provisions in the deed conveying the premises. The deed there in question contained the following clause: "It is understood and agreed as part of

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the consideration expressed above that only a single dwelling is to be constructed or placed upon each fifty-foot lot." And it was there held that the words "only a single dwelling" did not necessarily mean a dwelling house to be occupied by a single family and did not prohibit the erection of a flat or apartment building for the use of several families. The ruling in the Hutchinson case was adhered to in Voorhees v. Bloom, 274 Ill. 319, where it was held that a restriction in a deed that the grantee should not erect any building "except a single detached dwelling house did not prohibit the erection of a flat or apartment building." We are unable to see any substantial difference between the language used in the deed in those cases and the language in the deed conveying lot 9. In the Hutchinson case the deed contained the words, "only a single dwelling," while here the deed provides that the grantee is to erect "a residence" on the lot. Under the law restrictions in the deeds of conveyance are strictly construed and following the reasoning of the Supreme court in the Hutchinson and Voorhees cases, we are of the opinion that the restriction contained in the deed conveying lot 9 does not prevent the erection of an apartment building on the lot. Moreover, we are of the opinion that since the conveyance by Mrs. Touhy of lot 4 and the west 2½ feet of lot 5, permitting the construction on that property of the residences, flats or apartments, and apartment buildings on lots 4 and 5, and since the restriction contained in the deed from Mrs. Touhy conveying lot 7, which provided that only a building for residence purposes might be erected thereon, was for a period of but fifteen years, and since this period expired in 1926, so that apartment buildings may now be erected on lot 7, we are of the opinion that this neighborhood has changed to such an extent that it would be unequitable and would work a great hardship on the owner to enjoin him from constructing

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an apartment building on lot 9 and would be no benefit to the complainant, at least such benefit is doubtful. In these circumstances we think the Chancellor was warranted in dismissing the bill for want of equity. Ewertsen v. Gerstenbery, 186 Ill. 344.

The decree of the Circuit court of Cook county is affirmed.

AFFIRMED.

McSurely and Satchett, JJ., concur.

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(2) 1981

(3) 1982

(4) 1983

(5) 1984

(6) 1985

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

VICTOR J. CERWINSKI,
Plaintiff in Error.

351 I.A. 615
ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks the reversal of an order of the Municipal court finding him guilty of contempt of court and sentencing him to confinement in the County jail of Cook county for four months.

The record before us is confusing. As we gather the facts, defendant, having been sworn before Judge Borrelli of the Municipal court of Chicago, said that he had given \$75, which he had collected from the Clerk of the Municipal court from cash bail receipts given to him by Charles Spear, to a lawyer of the Chicago Bar to represent said Spear in a case wherein Spear was charged with disorderly conduct; the lawyer denied having received the money and thereupon defendant, Cerwinski, confessed that he had committed perjury in so answering the court.

We do not understand from the record that there was any case pending before Judge Borrelli in which the defendant, Cerwinski, was duly called as a witness. The incident seems to have arisen out of an inquiry conducted by the Judge at the request of Charles Spear, who was seeking to ascertain what had become of the money which Cerwinski had collected for him from the Clerk of the Municipal court on cash bail receipts. There was no legal process against the defendant to bring him into court to answer any charge of conversion by Spear. The inquiry by the court seems to have been wholly apart from any case or matter then properly pending in the court.

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Ordinarily perjury by a witness testifying upon the trial of a cause cannot be considered contempt of court. A direct contempt must be committed not only in the presence of the court but must have a tendency to affect some case before the court. An independent and voluntary investigation, such as this seems to have been, does not rise to the dignity of a cause in court. The only case in court to which any reference is made in the record is one which had been tried before Judge Trade in which Spear was charged with disorderly conduct; the inquiry conducted by Judge Borrelli had only a remote relation to that case.

We are unable to find any valid ground for sustaining the judgment finding the defendant in contempt. It will therefore be reversed.

REVERSED.

O'Connor, P. J., and Litchett, J., concur.

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C. J. GORMAN,
Defendant in Error.

vs.

T. J. CASEY,
Plaintiff in Error.

251-1-15
COURT OF THE DISTRICT COURT

IN AD.

MR. JUSTICE MCGURLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff, holding a note made by defendant, had judgment against him by confession. Subsequently defendant was permitted to appear and the case was tried upon the merits by the court, which rendered a judgment against defendant for \$1552, which he asks to have reversed.

The note was dated October 20, 1925, for \$1300, payable thirty days after date, to the order of plaintiff and executed by defendant. Defendant was the president of the Tri-Plex Washing Machine Company and plaintiff was its vice-president. The evidence shows that the plaintiff in the early part of 1926 was indebted to the Tri-Plex Washing Machine Company to the amount of \$1300 on his subscription to its capital stock. About this time defendant told plaintiff he did not have the money to pay his note and it was thereupon agreed between them that the defendant's salary account should be charged with this \$1300 and the plaintiff's stock account with the corporation should be credited with this amount, which would thus pay plaintiff's indebtedness to the company on the stock account. Defendant first suggested that he would have the company pay him \$1300 against his salary and he would then give the plaintiff a check for this amount in payment of the note and the plaintiff should then pay this into the company on his stock account; but plaintiff decided he did not want to have it done in this way. It was then agreed to put this through the books as a journal entry, charging the

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defendant's salary account and crediting the plaintiff's stock account.

It was amply proven that this item of \$1500 was entered upon the books of the company and it was amply proven that this was done at the suggestion of the plaintiff as well as of the defendant. By this arrangement the debt of the plaintiff to the corporation was paid and the same amount was paid by the corporation from the salary of the defendant and the note made by defendant and held by plaintiff was paid in full.

The defendant in error seeks to justify the judgment on the theory that the parties, while consummating this transaction, were acting as officers of the Iri-Plex corporation and that they had no right to deal with the corporation in their own interests nor the right to use and appropriate the funds of the corporation to their personal benefit. Undoubtedly this is the general rule, but it has no application to the present circumstances. This was a transaction between the parties as individuals and the corporation was not involved. In essence it was simply an arrangement whereby plaintiff's indebtedness to the corporation on his stock account was paid by the defendant, the consideration for this being the payment of the note of defendant held by plaintiff.

Plaintiff did not deny that this was the agreement, and in any event the bookkeepers of the Iri-Plex Molding Machine Company fully corroborated defendant's version of the agreement. Under these circumstances the court should have found that the note held by plaintiff was paid and the appropriate judgment should have followed.

For the reasons indicated the judgment of the municipal court is reversed, and as plaintiff is not entitled to recover and the case was tried by the court, the cause will not be remanded but judgment of nihil capiat will be entered in this court.

REVERSED AND JUDGMENT OF NIL CAPIAT.

O'Connor, P. J., and Matchett, J., concur.

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CATHERINE G. WELTER,
Appellee,

vs.

RUBY H. SCHELL,
Appellant.

APPEAL FROM JUDICIAL CIRCUIT
OF COOK COUNTY.

MR. JUSTICE McCURELY DELIVERED THE OPINION OF THE COURT.

On the afternoon of August 13, 1926, plaintiff was going east on Greenleaf street in Evanston, Illinois, in an automobile, hereinafter called a Willys-Knight, when it was struck by defendant's automobile going north on Forrest avenue, at the intersection of the two streets. Plaintiff received injuries for which she brought suit and upon trial had a verdict for \$2125. Judgment for this amount was entered, from which defendant appeals.

This was the second trial. Suit was first brought against the defendant and C. H. Briggs, whose employee was driving the Willys-Knight in which plaintiff was riding. Upon trial Briggs was found not guilty and a new trial was granted as to the defendant Schell with the result stated above.

Defendant argues that the evidence shows no negligence on his part which caused the accident. With the variant stories before it the jury could properly find that shortly before the day of the accident plaintiff's husband had bought a Willys-Knight automobile from an agency in Evanston and was given a thirty day free service guaranty. A few days later a hum or vibration developed which required attention. C. H. Briggs, the manager of the Evanston agency, told Mr. Welter to send the automobile to the agency's service station. Mr. Welter directed his wife (the plaintiff) to take the car there, which she did, and a mechanic, Charles R. Davis, employed by Briggs, worked on it and

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then said he would drive it for awhile to see if the vibration had disappeared. The plaintiff sat in the front seat beside him as he drove. In the rear seat was her sister, Mary C. Dunlop. They drove east two blocks on Greenleaf to Forrest avenue, which runs north and south, and there made a short stop at the west crosswalk. The three occupants looked to the north and to the south. They could see to the south a distance of about 250 feet and saw no automobile approaching from the south. They then started to cross Forrest avenue at a speed of about 10 miles an hour and had reached the center of Forrest avenue, when plaintiff discovered defendant's automobile about 75 feet south of the intersection and approaching at a speed estimated at about 40 miles an hour and without any signal by horn. She shouted a warning to Davis. Mrs. Dunlop testified that, when she first saw the car it was at least 200 feet away, coming very fast; it continued onward and when the front end of the Willys-Knight had almost reached the east crosswalk of Forrest it was struck on the right side back of the front door by defendant's car and shoved almost due north 30 feet and overturned. Plaintiff was severely injured.

Defendant's machine was driven by himself and he had as passengers two of his brothers and two others, making five in all. These parties gave testimony tending to controvert in many particulars the evidence given on behalf of the plaintiff.

Ralph T. Ball, a disinterested witness, was on the right-hand sidewalk of Forrest avenue, between 50 and 75 feet south of Greenleaf. He was a driver of a Checker taxicab and had delivered a passenger at that point on Forrest. He testified that he saw the Willys-Knight cross Forrest avenue, going about 10 miles an hour; that he later saw defendant's car going north and as it passed him he estimated the speed at 40 miles an hour. There was no horn blown by defendant. The witness was an experienced man,

driving automobiles for about 15 years. He says that when defendant's car struck the Willys-Knight the latter was east of the center of the intersection.

Under these circumstances both the negligence of the defendant and the alleged contributory negligence of the plaintiff were properly submitted to the jury, and we would not be justified in holding that the verdict in this respect is manifestly against the weight of the evidence.

It is strenuously insisted that, as defendant's car was approaching the street intersection on the right of the Willys-Knight, defendant's car had the right of way and that in proceeding to cross the street without waiting for defendant's car to cross, plaintiff was guilty of contributory negligence and defendant in continuing across the street intersection was guilty of no negligence.

Section 33 of the Motor Vehicle Law provides that vehicles shall give the right of way to other vehicles approaching along intersecting highways from the right, and many times this rule has controlled the decision of the case. Partridge v. Eberstein, 225 Ill. App. 209; Johnson v. Duke, 247 Ill. App. 372. While this is the general rule which should control under ordinary circumstances, yet it is a rule that must be observed with reason. It was never intended to relieve either party approaching the intersection of streets from the constant obligation to exercise care to avoid an accident. This paramount obligation rests on both parties, regardless of which of the two is entitled to the right of way. In the instant case the automobile in which plaintiff was riding stopped before entering the street intersection, and all of its occupants testified that on looking to the south for a distance of 200 feet they saw no approaching automobile. Then they proceeded slowly across the intersection. Defendant

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should have seen the other car crossing the intersection slowly and should have governed his car accordingly. Assuming that he was entitled to the right of way over the other car, this did not give him the right, regardless of the speed and position of the other car, to run into it. The right of way is not a license to act free from any obligation to use care to avoid injuring others, if reasonably possible. Under the instant circumstances the negligence of defendant in driving at a high rate of speed into the intersection without warning and without regard for the other vehicle was the sole cause of the accident.

Much of the brief is taken up with discussion of what is alleged to be the prejudicial conduct of the court both as to remarks and rulings on evidence. We have examined these alleged errors with care. We find nothing, however, of a prejudicial nature. Many of the remarks seemed to be fully justified.

We find no reversible error with reference to the giving and refusing of instructions. The instruction described as defendant's refused instruction No. 4 might properly have been given, but the refusal to do so should not work a reversal. The case was not close on the facts. Two juries in the instant case and a third in another case growing out of the same occurrence have found that the negligence of the defendant was the sole cause of the accident. The instructions given did not tend to confuse the jury and in the light of the evidence the instructions refused but not given could not properly have affected the result.

We see no convincing reason for reversal and as the amount awarded by the jury was not excessive, the judgment is affirmed.

AFFIRMED.

O'Connor, P. J.: I agree with the decision and all that is said in the opinion, but my views on the rule of the road are stated in *Heidler Hardwood Lumber Co. v. Wilson & Bennett Mfg. Co.*, 343 Ill. App. 39.

Matchett, J., concurs.

33005

VINCENT SENTOWSKI,
Appellee,

vs.

THE CHECKER TAXI COMPANY,
a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

December 31, 1926, plaintiff, while a passenger in a cab belonging to the Checker Taxi Company, was injured by reason of a collision between it and a taxi belonging to the Yellow Cab Company. He brought suit against both taxi companies and upon trial had a verdict against both, assessing his damages at \$2250. The court granted a new trial as to the Yellow Cab company and thereupon plaintiff dismissed his suit as to it. The motion for a new trial on behalf of the Checker Taxi Company, hereinafter called defendant, was denied and judgment was entered against it for \$2250, from which it appeals.

Plaintiff with his daughter and a brother-in-law was a passenger in one of defendant's cabs about 5:30 p. m., going westerly along Wacker Drive in Chicago. The collision between defendant's cab and the Yellow cab was at the intersection of Wells and Wacker. The Yellow cab was coming west on Wacker Drive and turned northward into Wells, when it collided with the west-bound Checker cab.

Defendant first asserts that the plaintiff did not state a cause of action in his declaration in failing to allege the negligence relied upon. If the declaration states a cause of action, however defectively or imperfectly, and the issue joined is such as to necessarily require proof of the facts defectively stated, it is sufficient. Smith v. Rutledge, 332 Ill. 150.

Defendant claims that the accident occurred through the sole negligence of the Yellow Cab Company. After considering the variant stories of the occurrence given by the witnesses, the jury could properly find that, as defendant's cab was approaching Wells it was running between 25 and 30 miles an hour; that at the same time the Yellow cab came from the west and stopped at Wells. The Yellow cab driver testified that the traffic officer stationed at that point signalled him to make the left turn going north into Wells and about the same time the officer gave a signal by whistle that the east and west traffic on Wacker should proceed. Plaintiff testified that as the Checker cab approached Wells he saw the Yellow cab about 40 or 50 feet away and saw it start to turn to the north; that when the Checker was about 30 or 40 feet east of the Yellow cab when it started to turn north, the witness called to the driver of the Checker, "Oh, stop! There's a Yellow coming." It is in evidence that the cab could have stopped within ten feet. The Checker driver, however, did not stop and there seems to be some doubt as to whether he slackened speed at all. Both cabs continued and came into collision. There is some argument as to which cab struck the other, but the fact is somewhat obscure. There is no doubt but that they came into violent collision. Under such circumstances the jury was justified in concluding that the driver of the Checker, either in failing to see that the Yellow cab was turning to the north or in failing to stop the car so as to avoid a collision, was guilty of negligence. It is unnecessary for us now to determine whether or not the Yellow cab driver was also guilty of negligence contributing to the accident.

Counsel for the defendant argues very earnestly against the action of the trial court in granting a new trial to the Yellow Cab Company and in denying its own motion for a new trial. The rulings on such motions were within the power of the

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trial court and its rulings in this respect can only be questioned as to the denial of defendant's motion for a new trial. The ruling upon the Yellow Cab Company's motion for a new trial and the dismissal of it by the plaintiff are not before us for review.

Complaint is made of the ruling of the court upon instructions. They are referred to in the brief by numbers only. Instructions criticised should be set out in the brief. S.P.S.Co. v. L'Hommedieu & Sons Co., 228 Ill. App. 201. However, we have examined the instructions and while some of them might properly have been given, yet they could not reasonably have had any effect upon the verdict. Under the facts the verdict was inevitable, regardless of the instructions.

It is claimed that the verdict is excessive. Plaintiff received injuries to the hands and fingers, necessitating some ten stitches between the small finger and the one next to it. There were some other cuts of a minor nature on the hand. The wounds healed, but the doctor testified there was some loss of motion in the fourth and fifth fingers. At the time of the accident plaintiff was earning a salary of \$40 a week and when he worked at home evenings he earned extra money. He was prevented from working for three weeks on account of this accident and then resumed his regular employment, doing the same kind of work as he did before the accident and receiving the same wages. His loss in wages and extra money was \$180 and his doctor's bill was \$37, or a total monetary loss of \$217. We are of the opinion that the judgment of \$2250 is excessive. There is some basis for the inference that the jury was moved by some hostility towards both the defendants. However this may be, the extent of the injuries did not justify so large a verdict. If the plaintiff will, within ten days after the filing of this opinion, remit from the judgment the

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sum of \$1,000 the judgment will be affirmed for \$1250; otherwise the judgment will be reversed and the cause remanded.

It has been brought to our attention by motion that Vincent Sentowski, the plaintiff herein, died on September 29, 1928. The judgment of this court will therefore be entered nunc pro tunc as of September 1, 1928.

AFFIRMED UPON REITERATOR;
OTHERWISE REVERSED AND REMANDED.

O'Connor, P. J., and Katchett, J., concur.

Figure 1. The effect of the concentration of the initiator on the polymerization of α -methylstyrene in the presence of $\text{Cu}(\text{NO}_3)_2 \cdot 3\text{H}_2\text{O}$ and $\text{Cu}(\text{OAc})_2 \cdot 2\text{H}_2\text{O}$ at 50°C in CH_2Cl_2 solution. The concentration of $\text{Cu}(\text{OAc})_2 \cdot 2\text{H}_2\text{O}$ was 1.0×10^{-3} mol/L, and the concentration of $\text{Cu}(\text{NO}_3)_2 \cdot 3\text{H}_2\text{O}$ was 1.0×10^{-3} mol/L. The concentration of $\text{Cu}(\text{OAc})_2 \cdot 2\text{H}_2\text{O}$ was 1.0×10^{-3} mol/L, and the concentration of $\text{Cu}(\text{NO}_3)_2 \cdot 3\text{H}_2\text{O}$ was 1.0×10^{-3} mol/L. The concentration of $\text{Cu}(\text{OAc})_2 \cdot 2\text{H}_2\text{O}$ was 1.0×10^{-3} mol/L, and the concentration of $\text{Cu}(\text{NO}_3)_2 \cdot 3\text{H}_2\text{O}$ was 1.0×10^{-3} mol/L.

2. \mathcal{L}_1 is a linear space over \mathbb{R} and \mathcal{L}_2 is a linear space over \mathbb{C} .

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RALPH VICEDOMINI,
Appelled.

vs.

LEON KIRK and ODELL I. KIRK,
Co-partners Doing Business
as Leon Kirk & Son, and
SAM ORNER,
Appellants.

261-1.315⁵
APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff in an action alleging conversion by the defendants of certain bakers' utensils and equipment, upon trial by the court had judgment for \$1,000, from which defendants appeal. As there must be another trial we do not attempt to detail the evidence.

The case was tried in an incoherent and piecemeal way. It should have been tried within two hours at most, but it extended over many days. The trial commenced June 19, 1928, continued on June 23, July 3, July 13, July 19, July 20, and finally concluded July 23. This partially accounts for the confusion in the record.

It seems that plaintiff leased from defendant Orner a storeroom to be occupied as a pastry shop for a term commencing September 1, 1924, and ending September 30, 1928, rental \$200 a month for the first two years and \$250 a month thereafter. Defendants Kirk & Son are real estate agents and represented Orner in negotiating the lease and also collected the rents for the landlord. In fitting up his shop plaintiff purchased equipment, in some instances giving chattel mortgages on the same. He went into possession and continued in business until December 27, 1924, when a fire occurred in the premises. Pending an adjustment of his loss with the insurance companies, his effects remained in the store but

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he failed to pay rent for December, 1924, and January and February, 1925. Orner distrained upon certain effects in the store for the rental due - \$600. This distress seems to have been under the direction of Kirk & Son. The distress return was filed in the Municipal court, and plaintiff appeared therein, filing a claim of set-off, which was stricken and he appealed to the Appellate court. Plaintiff testified that he settled with the insurance companies about the middle of February. Orner garnished the companies, having a judgment for rent by confession on the lease. Some time after January 15, 1927, apparently the parties got together and settled all their differences, Orner taking a non-suit in the distress proceeding and plaintiff withdrawing his prayer for appeal; the lease was cancelled, a \$500 bond which plaintiff had deposited as security was returned to him and plaintiff paid Orner \$300. Plaintiff testified that he knew and approved of the terms of the settlement.

The trial court, however, refused to permit any evidence, oral or documentary, to be introduced as to the terms and conditions of said settlement. This was reversible error. If the parties had settled all their controversies, defendants should have been permitted to show this.

Plaintiff testified that about January 15th a padlock was put on his door, locking up some of his effects. Other witnesses denied that there was any padlock, but it seems to be admitted that the door was locked with an ordinary key by some one from Kirk & Son's office. Defendants denied that they took possession of any effects except what were listed in the return of the distress warrant, and testified that there was nothing else in the store when this was served. The trial court sustained all objections to questions tending to show that other persons than the defendants had removed effects from the store after the fire, nor

was defendants' counsel permitted to show what property was covered by the chattel mortgages or whether or not the mortgagees had taken possession of the property under their mortgages.

Plaintiff was referred to a list of articles said to have been left in the store and was asked as to "the value to you of the various articles mentioned therein." This list with such valuations was improperly introduced in evidence and the judgment seems to have been based on this list.

This opinion might be extended by setting forth other particulars showing that there was not the orderly trial which is conducive to a considered conclusion.

For the reasons above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Latchett, J., concur.

RAVERE ELECTRIC COMPANY,
a Corporation,

Appellee.

vs.

CLAUDE W. MORRIS,

Appellant.

2511A. 6161
APPEAL FROM MUNICIPAL COURT

F O I CASE.

MR. JUSTICE MCGURRELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on a written contract for the purchase of certain stoves and electrical equipment. Defendant filed his affidavit of merits, which was stricken, also a second which was likewise stricken; and his third amended affidavit of merits was also stricken and defendant electing to stand by the same judgment was entered against him in the amount of \$2273.76, from which he appeals.

The contract sued on was in the form of a letter directed to the defendant as follows:

"Mr. Claude W. Morris, c/o Delaware Towers,
Delaware & Cass Sts., Chicago, Illinois. 6, 2, 27
Dear Sir: In line with our conversation of even date,
we are pleased to quote you on Standard Ranges as follows:"

Then followed details as to the ranges with prices, and signed by the plaintiff. It was also signed: "ACCEPTED: Claude W. Morris."

By the amended affidavit of merits defendant admitted the execution of the document and asserted that he made said agreement on behalf of "25 East Delaware Building Corporation," of which he was president and which corporation was the owner of the building in which the materials were installed; that while plaintiff might have held either this defendant or the corporation on said order, it elected to hold and look to the corporation for payments and received divers and sundry payments on account made by said corporation, and therefore plaintiff is precluded from claiming anything from this defendant, as the defendant was acting only as the agent of said corporation, which was understood by plaintiff.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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3. $\frac{1}{2} \leq \frac{1}{2} \leq \frac{1}{2}$ and $\frac{1}{2} \leq \frac{1}{2} \leq \frac{1}{2}$

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$$1 \leq i \leq n, \quad 1 \leq j \leq m, \quad 1 \leq k \leq p, \quad 1 \leq l \leq q$$

Journal of Management Education 30(6)p.789-806

1. The first part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as $t \rightarrow \infty$. It is shown that the solutions of the system (1) tend to zero as $t \rightarrow \infty$ if and only if the matrix A is Hurwitz.

Furthermore, that after finishing the work the corporation had no funds wherewith to complete payment to the plaintiff; that plaintiff threatened to commence a mechanic's lien suit and thereupon the defendant, as president of said corporation, in consideration of plaintiff's not instituting a mechanic's lien suit, agreed that the corporation would pay \$500 a month on account of said indebtedness; that plaintiff agreed to this and the corporation did pay \$500, which was accepted by plaintiff, but thereafter plaintiff refused to accept further payments from the corporation.

The sole point is the liability of the defendant Morris under the agreement. The rule is conceded to be that, if a person undertakes to contract for an individual or corporation and contracts in a manner not legally binding on his principal, the person so undertaking to contract is personally liable on such contract; and although the other party may know that the party signing the contract is acting as an agent for a principal, this does not free him from individual liability where the contract is in his own name and not in the name of the principal. Sealing v. Knollin, 94 Ill. App. 443; Kudelman v. Haffenberg, 199 Ill. App. 463; Macdonald v. Bond, 96 Ill. App. 116; Wheeler v. Reed, 36 Ill. 61.

Defendant's point seems to be that, admitting his original liability on the contract, yet when plaintiff agreed to accept payments from the corporation and did accept the same, he was thereby released from liability. We are referred to no supporting cases. The fact that a third person makes payment which is accepted by the creditor cannot affect the liability of the original debtor. Such payments were purely voluntary and do not make one who makes such payments a party to the contract.

The amended affidavit of merits did not present a legal defense and the action of the court in striking the same

and entering judgment for the plaintiff was proper. The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

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ANTHONY J. GREENEYS and
 JULIA GREENEYS,
 Defendants in Error,

 vs.
 JOHN JONALIS,
 Plaintiff in Error.

7-1-16
 ERROR TO SUPERIOR COURT
 OF COOK COUNTY.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Defendant by this writ of error seeks the reversal of an adverse judgment for \$3082.50 entered upon the verdict of a jury. This case has already been before this court (244 Ill. App. 78), in which the judgment then obtained was reversed on purely technical grounds relating to pleading and practice.

The case was in assumpsit, plaintiffs filing the common counts with an amended bill of particulars alleging that they had paid out certain moneys for the benefit of the defendant. Defendant pleaded non-assumpsit and also by a special amended plea asserted a former adjudication of the claims of plaintiffs in the Circuit court of Cook county and a judgment that they take nothing.

In August, 1924, defendant was an employee of the Illinois Bell Telephone Company which had him arrested, charged with stealing cable and wire. The plaintiffs are husband and wife, and Julia is a sister of the defendant. They busied themselves in assisting defendant in his controversies with the Telephone company and through a man named King, who is described as a worker in the police court, they employed Thomas J. Johnson, an attorney of Chicago, to represent the defendant. Plaintiffs and defendant owned a farm near Palos Park in Cook county, and some one - probably Johnson - made them believe that the Telephone company would proceed against the farm; for the purpose of "protecting" the farm defendant was advised to give notes to the plaintiffs aggregating \$3500. The parties apparently are of foreign birth

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and Greenys is unable to read and write the English language. The advice was followed and the notes were given. Subsequently plaintiffs brought suit on one of these notes in the Circuit court. Defendant pleaded no consideration and was successful before a jury. Subsequently the instant case was brought in the Superior court and defendant attempted to plead this former adjudication in the Circuit court as a bar to the instant suit.

The plaintiffs argue that the plea of res adjudicata is insufficient both as to form and substance, and it may be conceded that the plea is inartificially drawn. But as the parties went to trial and the plaintiffs were successful, their criticism of the form of defendant's plea is not important.

The defendant had the burden of proving that the causes of action in the two cases were identical. The cause of action in the first case was not properly proven in the instant case, but it does appear that the suit was brought upon one of the notes given plaintiffs for the purpose of "protecting" the farm as above described. The present Superior court case is for moneys paid out by plaintiffs at the instance and for the benefit of defendant. The causes of action were not the same.

It appears that after an examination on the charge of stealing from the Telephone company, defendant was discharged. At the same time another information was filed against him by the Telephone company charging him with stealing and upon trial he was found guilty and released on probation. Johnson was requesting money for his services in representing the defendant in these matters and defendant sold some telephone stock for \$506.84 and gave this to Johnson. To meet Johnson's further demands plaintiffs borrowed \$500 from Alex Kasenski, who gave them a check payable to his own order and endorsed by him. This check was given to defendant, who endorsed it and gave it to Johnson. Plaintiffs also

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borrowed \$1,000 from Anton Garva and then another \$1,000 from the same source, and these sums were given to Johnson to represent the defendant. Neither Kasenski nor Garva would lend the money directly to the defendant, but did lend it to the plaintiff's to be used for defendant's benefit. The defendant in the instant case denied that this money was paid to Johnson, but for the purpose of impeaching his testimony it was shown by the shorthand reporter who took the evidence upon the trial of the Circuit court case that defendant, in answer to the question as to how much money was paid to Johnson altogether, answered \$3,000, and further answered in substance that his sister borrowed \$2,000 from Garva to pay Johnson to act as the attorney for the defendant in the suits brought against him by the Telephone company.

Plaintiff's' version of the transaction is supported by documentary evidence and by the testimony of four witnesses. Against it we have the testimony of defendant, which was contrary to his testimony given in the trial of the Circuit court case. Plaintiff's' claim was amply proven by the greater weight of the evidence.

Some criticism is made of the rulings of the court with reference to instructions, but they are not of sufficient importance to justify a reversal.

There is also criticism of remarks of the court as to certain notes as "these notes," but counsel do not agree as to what notes the court referred to. In any event, there was no prejudicial error in this regard.

In support of his motion for a new trial defendant presented the affidavit of Thomas J. Johnson, the attorney, in which he said that he received for his services the sum of five hundred (and some odd) dollars and that this was the only money

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paid to him. There is no pretense that the defendant did not know before the trial that Johnson would testify to this, and there is no explanation whatever as to why he was not subpoenaed as a witness. There is no attempt to show any diligence in the matter.

Upon the entire record, we see no convincing reason for reversal and the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matcnett, J., concur.

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ALYCE MAY ZEMER,
Appellee,

vs.

MORRIS W. E. BYRNE, FRANK FEUER,
HARRY FEUER and JOSEPHINE FEUER,
Defendants.

MORRIS W. E. BYRNE,
Appellant.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE KATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff in this case conducted a millinery store on the first floor of 6314 Cottage Grove Avenue. She held the premises as the lessee of Josephine Feuer. The second floor of the premises was at this time (which was March 23, 1925) occupied by defendant Dr. Morris W. E. Byrne, a practicing physician, Dr. Burns, a dentist, and Dr. McNeill. The office of the defendant was immediately above the store occupied by the plaintiff.

Plaintiff sued, alleging defendant carelessly, wantonly, negligently and improperly permitted a wash bowl to become clogged and the water to remain running so that it overflowed her store immediately below, injuring merchandise, as she alleged, to the amount of \$461.45. The landlord, Josephine Feuer, was made a co-defendant.

There was a trial by the court and a finding of the issues in favor of the defendant, Josephine Feuer, and against defendant Byrne. Plaintiff's damages were assessed at \$337.45 and judgment was entered against defendant Byrne for that amount. The affidavit of merits is not abstracted. There were motions by defendant Byrne at the close of plaintiff's evidence and at the close of all the evidence for a finding in his favor which were denied by the court, and the defendant contends here, if we under-

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stand his point aright, that there is no evidence tending to show negligence on the part of defendant and that even if an inference of negligence is conceded, that inference is rebutted by other uncontradicted evidence.

The plaintiff has not appeared in this court to support the judgment, and we regret the necessity of considering the case without the aid of any brief in her behalf.

The uncontradicted testimony tends to show that when plaintiff went to her store as usual about a quarter to nine o'clock on the morning of March 28, 1925, she found water coming down from the ceiling above; that it was hot water and that a part of the store was covered by it; that she called assistance and went to the second floor to the office of the defendant where the door was found to be locked. Entrance was obtained through a window and the door opened; entering defendant's private office, water was found running from the faucets into the wash bowl and overflowing from the wash bowl onto the floor. Cotton was found in the drain pipe and a rubber glove was found in the washbowl. The glove and the cotton were taken out and the water at once ceased to overflow. Plaintiff testifies that "the wall was all flooded" and the water was running down into the ceiling. The cotton was of the kind which the defendant, who was a physician, had used in his practice on the previous day. He had also used the glove, and testifies that he left the same on the previous evening on the ledge of the washbowl to be washed and sterilized by his attendant and made ready for use at another time. The faucets in defendant's office were what is known as the gooseneck type.

Defendant Dr. Byrnes, and Dr. McNeill used a reception room in common and there was an entrance through a door between the offices of defendant and Dr. Burns.

The evidence submitted in behalf of the defendant tends to show that on the evening of the 27th defendant left his office about 9:15 p. m., and he says that he left the faucets in his office shut off; that on that evening a painter was at work in the office of Dr. McNeill and that after defendant left the painter came to the office of Dr. Burns and asked permission to get into the private office of the defendant to get water; that this permission was given, and Dr. Burns testifies that he saw the cald-miner enter the office; that the light was turned on and that Dr. Burns showed the painter where to get the water. Defendant testifies that the door to his own private office was locked by him before he left on that evening. Dr. Burns says that he left between thirty-five minutes and an hour later than the defendant, leaving the door from the reception room to his own office unlocked; that after the painter went into defendant's office he heard the water running in the faucets and saw the painter come out with a pail of water, but that he heard no water running after the painter left. He further testifies that the painter was still in the rear office when he, Burns, went home, leaving the door to the office unlocked, after telling the painter "to pull the door to" when he got through. There were no high gooseneck faucets in the other offices on that floor, and the office of defendant was the only one from which the painter could conveniently draw water. The painter had some time previously worked in defendant's office and in the common reception room, but he was not employed by the defendant or paid by him. Defendant allowed the painter to use the faucets while working in defendant's own room and in the reception room, but he says he did not expect him to use the faucets on that night.

There was uncontradicted evidence tending to show that the painter had been hired by the manager of the building. There

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was also evidence tending to show that prior to March 27, 1925, there had been complaints of defects in the water pressure of the water system connected with the building. One of the tenants testified that water would come on occasionally and then stop; that when complaints were made to the landlord the explanation given was that the restaurant in the building was using all the water so that the second floor could not get any; that there had been promises to have it fixed and that a few days after the accident to the millinery store, digging had been done in the street after which there was no more trouble with the water.

We do not doubt that the evidence submitted by plaintiff was prima facie sufficient to establish negligence on the part of defendant which would make him liable for the damages plaintiff sustained. Thompson's Commentaries on Law of Negligence, vol. 1, sec. 711, p. 653. It having been made to appear that the property of plaintiff was damaged by an overflow of water coming from a washbowl in a room occupied by defendant of which he had the exclusive right of control, there is a presumption that the damage was due to the negligence of defendant and the burden of proof was shifted to him to show by a preponderance of the evidence that the damage was not due to his negligence. Chicago Telephone Co. v. Commercial Union Assurance Co., 131 Ill. App. 248.

The brief of the defendant cites numerous authorities to the propositions of law that the defendant in such case is not liable where the injury is the result solely of the negligent act of a third person; that the defendant is not liable in such case where he had no control over the person committing the act; that a landlord who undertakes to make repairs on rented premises is liable for injuries resulting from his negligence or that of his servants in making such repairs. These and other propositions, in support of which many unquestioned authorities are cited, cannot

avail, since the controlling question here is whether the evidence submitted in behalf of defendant was sufficient to overcome the prima facie case which was undoubtedly established. It was a question of fact for the trial Judge to determine from all the evidence whether such defense had been established, and the finding of the Judge in that respect is entitled to the same weight as we would be obliged to give to the verdict of a jury. There is no proof in the record other than by inference that the painter returned to defendant's office after obtaining the bucket of water which Dr. Burns permitted him to take. We cannot infer in the absence of evidence that he did return, and from that inference draw the further inference that he was negligent in leaving the faucets open and further negligent in permitting the glove and the cotton to get into the bowl and obstruct the flow of the water. It was for the court to weigh all the evidence. The court could either believe or disbelieve from the evidence some of the material facts which were testified to by the defendant's witnesses. In other words, the ultimate issue was one of fact for the court to decide, and defendant does not argue that the finding on this issue of fact is clearly and manifestly against the evidence.

Defendant also argues that the amount of damages allowed by the court is not sustained by the evidence. We have examined this contention, however, and find that there is evidence prima facie sufficient to sustain the amount of damages allowed and that this evidence is uncontradicted.

It follows that the judgment of the trial court must be affirmed.

AFFIRMED.

O'Connor, P. J., and McCurely, J., concur.

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GEORGE P. RACINE,
Appellant,

vs.

R. E. LUBBERS,
Appellee.

20.1.1. 316
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This cause was heard by the chancellor upon exceptions to a master's report. The exceptions were over-ruled and the amended bill dismissed for want of equity. Racine, complainant, appeals and urges the single point that the findings of the master are against the manifest weight of the evidence.

Racine was the owner of bonds for the amount of \$32,500. These bonds were secured by a mortgage upon a leasehold estate in Chicago. The bill of complaint alleges that on January 21, 1927, Lubbers represented to Racine that he had a contract with the owners for the purchase of the leasehold estate and proposed that if Racine would sell these bonds to him he would pay therefor the sum of \$20,000 from the proceeds realized from the sale of the leasehold and as evidence of his obligation he would deliver his two notes for \$10,000 each signed by himself and William J. Gallagher of Sterling, Illinois; that he would procure a release from Gallagher in favor of Frank L. Pitney and William C. Baber of any liability to Gallagher on account of \$8,000 which Gallagher had invested in the premises through Pitney and Baber.

The bill says that relying on these representations and promises, complainant on January 25th delivered the bonds to Lubbers and that at that time Lubbers stated to complainant that if he would temporarily accept the individual notes, he, Lubbers, would thereafter procure two notes for \$10,000 each signed by Gallagher and also the release and would deliver the same to complainant and take up his individual notes.

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The bill further charges that defendant was unable to obtain the signature of Gallagher to these documents, and avers that at the time of making the representations upon which complainant relied, Lubbers knew that he could not obtain the signature of Gallagher and that he could not obtain the release; that these representations were made by Lubbers for the fraudulent purpose of obtaining the bonds from complainant. The prayer of the bill is that defendant may be required to turn over the bonds, complainant offering to return defendant's notes and that defendant may be restrained from selling or transferring the bonds.

The answer of the defendant admitted entering into an agreement with the complainant for the sale of the bonds in consideration of the sum of \$20,000 to be evidenced by complainant's promissory notes for \$10,000 each; averred that as a part of the transaction complainant agreed to have a lien of a judgment for \$3,631 in favor of one Lou May McGraw released, but denied that defendant agreed at any time to obtain the signature of Gallagher upon the notes or any one of them, or that he ever agreed that if complainant would accept defendant's individual notes he would thereafter procure two notes signed by Gallagher, and denied that he ever agreed to obtain from Gallagher a release of Pitney and Baber from any alleged liability. The answer also denied that defendant was insolvent as alleged in the bill; averred that complainant had failed to have the lien of McGraw released; alleged that the bonds were of little or no value, and denied that complainant relied upon any representation made by defendant with reference to the giving of notes signed by Gallagher or the furnishing of a release by him.

The master found that there was a conversation between Lubbers and Racine with reference to obtaining the signature of Gallagher, but that later when the deal was closed on January 25th Racine turned over the bonds to Lubbers with full knowledge that

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Gallagher had not and would not sign the notes. An examination of the evidence discloses Racine testifying one way and Lubbers the other. The original proposition made in writing on January 21, 1927, was that Gallagher should sign the notes, but at the later conversation on the 25th before the bonds were delivered, Lubbers says he informed complainant that Gallagher would not sign and that the deal was closed with that understanding.

Craddock, who was in charge of the building, gives rather indefinite evidence tending to sustain the contention of complainant, while Miss Pitney, who was complainant's stenographer at the time and who wrote the agreement of January 1st, testifies, corroborating Lubbers, that Lubbers in her presence told complainant that Gallagher was disappointed with the property, that he was going back to Sterling, Illinois, where he lived and would have nothing to do with the deal; that he was off it entirely and would not go into it. She says that Racine then suggested that he would take defendant's notes for the money; that defendant first said that he was not interested and left the office saying that he would think it over; that defendant later came back into the office, when an assignment of the mortgage securing the bonds to defendant was drawn up, signed and delivered by complainant. This assignment is in evidence and includes an agreement on the part of complainant to get a waiver of the McGraw lien. Defendant was represented in the transaction by Attorney Wm. A. Rogan, and the evidence of Rogan's clerk is that the bonds were personally delivered by Racine at Rogan's office in the first part of February. Complainant wrote a letter to Rogan under date of January 31, 1927, which, however, is not abstracted. This letter describes at length the mortgage which secured the bonds and the lease which the mortgage covered and states the amount still unpaid on the bonds to be \$32,500. Again, on February 1, 1927, complainant wrote Rogan another letter (not abstracted) as follows:

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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4. *Journal of the American Statistical Association*, 93(443), 1089-1092.

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Figure 1. The effect of the concentration of the inhibitor on the rate of polymerization of α -methylstyrene in the presence of SnCl_4 at 25°C .

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J. MADISON PAGE,
Appellant,

vs.

THE CAPITOL GARAGE, Inc., and
WILLIAM M. CARLETON,
Appellees.

RECEIVED FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, J. Madison Page, brought suit in replevin to recover possession of a Marmon touring car. He made the Capitol Garage, Incorporated, a corporation, and William M. Carleton defendants to the suit. There was a trial by the court, and at the conclusion of plaintiff's evidence, upon motion of the defendants, there was a finding of a right of possession and property in them, upon which judgment was entered with an order for a writ of retorno habendo.

It is urged that the finding and judgment are contrary to the law and the manifest weight of the evidence. Defendants have not appeared to support the judgment, and after a careful consideration of the record we conclude that the assignments of error must be sustained.

Plaintiff testified that he was a real estate appraiser with an office at 111 West Washington Street, Chicago; that he was the owner of the Marmon touring car described which he obtained from a man who owed him money as payment for his debt, and that he, plaintiff, placed this car in the Capitol Garage, Incorporated; that William M. Carleton was the owner of that garage; that plaintiff had loaned Carleton money upon stock in the corporation; that Carleton was a tenant in certain property of plaintiff in Evanston, Illinois, and was indebted to him for about a year's rent; that he asked Carleton if he, Carleton, could sell the Marmon car; that Carleton told him to bring it into his garage,

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as there was plenty of room there and that he would not charge him anything for it and that he would sell it for him. Plaintiff further testified that he told Carleton where the car was; that Carleton went and got it and placed it in the garage; that some time in March, 1928, a Mr. Graff sold the car for plaintiff to a Mr. Bowers, and that plaintiff gave him a letter to the Capitol Garage, Incorporated, requesting that the car be given to Mr. Graff; that it refused so to do and plaintiff was told that the garage claimed storage fees; that plaintiff tried to get in touch with Carleton but he was not around, so plaintiff brought a replevin suit.

On cross-examination he further stated that Carleton did not pay him any money on his debt; that he, plaintiff, had never agreed with any lady that he would pay storage for the car, had never taken the car out, had never given authority to any one to take the car out and had never ordered any gas or repairs on the car; that if the car had been out it was used by somebody in the garage.

Helen L. King, who was called under section 33 of the Municipal Court act, testified that she was a part owner of the defendant Capitol Garage, Incorporated; that she bought her shares from William M. Carleton, who was president of the corporation for awhile after it was incorporated. She said she saw plaintiff but once and that was some time in June, 1927, before the trial, but she did not remember the date; that defendant drove into the garage in a Cadillac and asked for Mr. Carleton, and she informed him Carleton was not there at that time. She said she told him it cost \$10 a month for garage storage for his car, and that he drove away; that she did not hear him talk with Mr. Carleton about letting the car stay in the garage without any charge and that she did not know whether Carleton owed plaintiff any money; that Mr. Graff brought a letter from Mr. Pace asking for the Harmon car; that she

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told him he could have the car after he paid the storage and other costs; that Graff said Carleton agreed not to charge plaintiff any storage, but she told him Carleton had nothing to do with it, as she was the owner; that he went away and the next thing the car was replevied. She testified that she owned most of the stock in the Capitol Garage; that the Larson car was in the garage for ten months at \$10 a month, and that the bill was then of \$100 - \$10 for storage, \$10 for gas and oil and \$11.50 for repairs. On cross-examination she stated that plaintiff did not take the car out at any time but sent someone else to use it; that no one in the garage ever used it; that she never made any demand for the payment of the storage; that she did not agree to let the car stay in the garage free and never heard Mr. Carleton agree to let it stay in the garage free. She further testified that Mr. Carleton was in Minneapolis and that he had nothing further to do with the garage.

The ground for the motion by defendants was that since plaintiff himself testified that he sold the car in March, 1914, and therefore did not order repairs after that time, plaintiff had no right to maintain the action because he was not the owner of the car. Plaintiff stated however that the sale was not to be completed until he delivered the car to the purchaser, and the uncontradicted evidence in the record tends to show that plaintiff was unable to make delivery to the purchaser because of defendant's refusal to deliver up the car. The court therefore erred in granting the motion.

For the error indicated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P. J., and McCreely, J., concur.

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JOSEPH KORMAN,
Appellee,

vs.

MORRIS GOLDMAN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE KATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff Korman sued defendant Goldman alleging that on December 23, 1925, he was a duly licensed real estate broker in Chicago; that Goldman at that time and place requested him to find a purchaser for certain unimproved property agreeing to pay a reasonable commission therefor; that on December 24th plaintiff procured such purchaser, one Mary Bolas, who offered to purchase at the price for which plaintiff agreed to sell and who was ready, willing and able to consummate the purchase, but that defendant failed and refused to sell. He alleged the fair and reasonable charge for services as broker to be \$1,495.33.

In his affidavit of merits defendant denied that he requested plaintiff to find a purchaser or entered into any agreement with him concerning the property; denied that he agreed to pay any sum for services as alleged, and averred that at the time plaintiff claimed to have produced the purchaser said property had already been sold and that any alleged offer to sell by defendant was revoked; denied that Mary Bolas was ready and willing to purchase at the time alleged or that anything was due for plaintiff's services.

There was a trial by jury and a verdict for plaintiff in the sum of \$1,495.33, upon which the court, over-ruling defendant's motions for a new trial and in arrest, entered judgment.

It is argued that on the uncontradicted evidence plaintiff could not recover because no contract between the proposed purchaser and defendant was ever consummated, because it

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does not appear the owner and purchaser ever agreed upon the terms of sale, because the evidence was inadequate to establish the necessary fact of the ability of the purchaser to buy, because plaintiff was not faithful in the performance of his duties as an agent, because the proof as to the amount alleged to be due was insufficient, and because the court erred in giving instructions at the request of plaintiff.

The evidence is in conflict, but holding (as we must) that the issues of fact are settled in favor of the plaintiff by the verdict of the jury, the proof shows plaintiff was a duly licensed real estate broker, having in his employ one Hyman Marcus; that defendant was the owner of certain vacant real estate in Chicago situated at the northwest corner of 63rd street and Lawndale avenue; that defendant had an office with Marks & Company, who were in the real estate business; that he, through conversations with Hyman Marcus, requested plaintiff to find a purchaser for his vacant real estate at the price of \$142.50 a foot, the purchaser to make a deposit of \$2,500, \$20,000 cash to be paid upon completion of the sale and the defendant to take a mortgage on the property for in two years at six per cent interest for the balance of the purchase price; that Miss Bolas was a client of Hyman Marcus; that Marcus met defendant at Marks & Company's office on Friday morning, December 23rd, at ten o'clock and told defendant that he would bring over Miss Bolas with the check; that he then went with Miss Bolas to the Pioneer Trust & Savings Bank and got a certified check for \$20,500 and went back with plaintiff and Miss Bolas at 12:15 or 12:30 and then waited at Marks & Company until about 1:45, when the bank closed for the day. Marcus called defendant several times about the matter and talked with him by phone at about ten o'clock Saturday night, when defendant said that he was busy but would see him Monday; that Marcus saw defendant again on Monday about twelve

o'clock noon, when defendant said that he would see him again in a couple of days. About a week later defendant told him the deal was off.

As a matter of fact, the evidence discloses without contradiction that on December 24, 1925, defendant sold the property to Cornelius H. Warrand, Marks & Company acting as brokers. The certified check of Miss Bolas, drawn as of December 26, 1925, to the order of defendant for \$2,500 and endorsed as deposit on the purchase price of the property described, is in evidence. The check was issued a few minutes after twelve o'clock on December 24th, and as all business was closed at twelve o'clock, it was dated as of the following Monday, the 26th.

The jury was, we think, justified in concluding that defendant failed to meet the proposed purchaser for the purpose of avoiding the transaction. Plaintiff did not have an exclusive right to sell, and if the owner himself or some other broker had found a purchaser ready and willing prior to the time plaintiff notified defendant that he had such purchaser, defendant would not have been liable to plaintiff for commissions. Metzen v. Wyatt, 41 Ill. App. 487; Bryant v. Palmer, 171 Ill. App. 213. On the other hand where, as here, defendant was notified by the plaintiff that he had procured such purchaser, defendant could not, by refusing to meet the purchaser, afterwards successfully defend on the ground that the contract had not been completed as to essential terms. The cases therefore which defendant cites to this point (viz. White v. Rezek, 184 Ill. App. 12, and Stein v. McKinney, 313 Ill. 84) are not applicable.

Neither, in view of defendant's avoidance of the purchaser, do we think that a great deal of attention should be paid to his contention that the evidence fails to show that the proposed purchaser was able and willing. Miss Bolas produced a certified

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check, and if it had not been her intention to purchase the property at the price named it would be difficult to understand why she would wish to put up her check. There is prima facie evidence sufficient to show that she was a responsible party, and the fact that defendant was able to sell the property on the same day at a higher price than she was to pay, also indicates that she was not without talent in business matters.

Nor are we impressed with the contention that plaintiff was not faithful in the performance of his duties as an agent. Defendant knew the prospective purchaser was a client of Hyman Marcus. Moreover, the owner fixed the price upon advice of Mr. Marks of Marks & Company. It is apparent he did not rely upon the plaintiff in this respect and that his employment of the plaintiff did not contemplate services in that regard.

Defendant also contends that the evidence does not sustain the damages allowed. However, the allegations of the statement of claim are full and complete in that respect and are not specifically denied by defendant's affidavit of merits. We think the evidence is prima facie sufficient.

Defendant also complains of an instruction by which the court told the jury that if it found from a preponderance of the evidence that defendant requested the plaintiff to obtain a purchaser for the real estate in question at a total price of \$43,177.50, \$20,000 to be paid in cash and the balance by the execution of a purchase money mortgage, due on or before two years after date of sale with interest at six per cent per annum, subject to prorating of taxes and assessments for the year 1925, and agreed to pay the plaintiff for his services the fair, reasonable and customary charges therefor; that plaintiff procured such purchaser, who was ready, able and willing to pay the said price and on the terms

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specified; that plaintiff used his efforts in good faith to complete the negotiations and in so doing acted solely in the interest of defendant; that plaintiff was the efficient and procuring cause in obtaining the purchaser and that his services had not been terminated prior thereto, then their verdict should be for the plaintiff although it might appear that defendant refused to go on with the sale and although it might further appear that the defendant had not executed any writing or given any written authority to the plaintiff to consummate the sale. It is urged against this instruction that it recognizes the pro rating of taxes and assessments, although there is no evidence in the record as to whether the taxes were to be prorated or assumed by the purchaser. It is urged this instruction is erroneous on the authority of Dowdy v. Palmer, 257 Ill. 42; Forbes v. Davis, 200 Ill. App. 378, and Aulcay v. Allford, 113 Ill. App. 423. As we have already pointed out, defendant is in no position to urge that specific items were not agreed upon in a specific contract since his refusal to meet the proposed purchaser rendered such agreement impossible. It is true there is nothing in the record that justifies the reference in the instructions to taxes and assessments, but we think the error, if error it was, was harmless.

A careful examination of the record leaves us without doubt the jury returned a proper verdict and that the judgment entered on the verdict is in substance just. It is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

ANNA D. SIELAFF, administratrix
of the estate of William C. Sielaff,
deceased,

Defendant in Error,

v.

JAMES E. BENNETT, FRANK A. MILLER
and FRANK J. SAIBERT, copartners
doing business as James E. Bennett
& Co.,

Plaintiffs in Error.

BRANCH TO

CIRCUIT COURT,

CLATSOP COUNTY.

MR. PRESIDING JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

On October 18, 1927, on a third trial, a jury returned a verdict finding the issues for plaintiff and assessing her damages at \$10,625.30. On November 19, 1927, the court entered judgment upon the verdict against defendants and they sued out the present writ of error.

The action, in assumpsit, was commenced on September 21, 1920, in the lifetime of William C. Sielaff, against five defendants, viz., the three members of said firm and W. J. Krueger and W. B. Harris. The declaration consisted of the common counts, to which pleas of the general issue were filed.

On May 25, 1922, upon motion of defendants, Sielaff filed a bill of particulars of his claim, stating in substance that early in the year 1920, he paid to said firm the sum of \$11,040, in full payment of certain securities; that, while they were owned by him but in the firm's possession, the three co-partners and Krueger and Harris improperly and wrongfully used them without his consent, and "traded on the same, or otherwise misappropriated them," so that all of them were lost to him; that Krueger executed the trades

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through Harris and said firm, which then was engaged in a stock brokerage business in Chicago; and that all of the defendants were cognizant of said wrongful and improper dealings and of said "conversion or misappropriation" of said securities.

In December, 1922, there was a trial before a jury, during which Sielaff testified as a witness and other oral and documentary evidence was introduced in his behalf, and upon his motion the suit was dismissed as to Krueger and Harris. At the conclusion of Sielaff's evidence and upon motion of the remaining defendants, the court instructed the jury to return a verdict in their favor. Such verdict was returned and judgment entered thereon against Sielaff for costs on December 27, 1922.

On April 4, 1924, Sielaff sued out a writ of error to reverse the judgment, and, on April 28, 1924, his death being suggested, Anna D. Sielaff, administratrix of his estate, was substituted as plaintiff in error. Such proceedings thereafter were had in this appellate court that on February 3, 1925, the judgment against Sielaff of December 27, 1922, was reversed and the cause remanded to the circuit court for a new trial. (Sielaff v. Bennett, 236 Ill. App. 643.) The decision was rendered by a divided court. In the majority opinion (not published), it is said in part:

"All of Sielaff's transactions with Bennett & Co. occurred within a period of six months, and within the six months next preceding the commencement of his suit. His position on the trial was in substance that Bennett & Co. had unlawfully converted to its own use money, and securities or the proceeds thereof, which in equity and good conscience should be returned to him; and he took the further position that all of the transactions (except the first one when he purchased the said securities outright) were gambling transactions, in violation of the provisions of section 132 of the Criminal Code, and that the money or securities lost by reason of said transactions could be recovered back in an action of assumpsit (as was this action) for money had and

received. * * After reviewing the evidence we are of the opinion that the trial court erred in instructing the jury to find the issues in favor of Bennett & Co., and in entering judgment upon that verdict. There was sufficient evidence, we think, tending to show an unlawful conversion on the part of Bennett & Co. of some of Bielaff's money, or the proceeds of some of his securities, and, also, that Bennett & Co. was liable as a 'winner' in said assumpsit action under the provisions of said statute, as to require the submission of the case to the jury."

After the case was redocketed in the circuit court it was ordered that the cause proceed in the name of Anna D. Bielaff, administratrix, etc., as plaintiff. More than a year thereafter, on May 7, 1926, she was given leave to withdraw the first bill of particulars, and, upon defendants' motion, ordered to file a new one.

In this new bill of particulars, filed May 18, 1926, she stated in substance that early in the year 1920, William C. Bielaff began a course of dealings with defendants, who were "brokers in stocks and grain" in Chicago; that in March, 1920, he paid them by three checks the total sum of \$11,080, which covered the purchase price of certain shares of stock bought by them for his account; that some of the certificates for the shares were retained by them and others delivered to him, but, as to those delivered to him, "all eventually found their way back to them," and all of the shares represented by said certificates "were afterwards sold or disposed of by defendants, or claimed to have been sold and disposed of by them, as evidenced by their statements issued from time to time, and the proceeds of said sales were credited to said Bielaff's account;" that said credits "were applied to his losses suffered in trading with defendants in stocks and grain, and in commissions on purchases and sales of stocks and grain received by them and charged to his account;" that in said trades his total losses amounted to \$9,960.90, which were incurred through the purchases and sales of stocks and

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grain, of which no deliveries ever were made; and that "it was intended by said Sielaff and defendants, at the time of making contracts concerning said stocks and grain, that the options, whenever exercised, or the contracts resulting therefrom, should be settled, not by receipt or delivery of the property involved, but by the payment only of differences in prices thereof."

In December, 1926, there was a second trial of the case, resulting in the discharge of the jury because they were unable to agree. During the progress of that trial, on her motion, plaintiff was given leave to file an amendment to her bill of particulars "by adding items to conform to the proof introduced in evidence." By this amendment, filed December 23, 1926, there was added to the total of \$11,080, mentioned in said new bill of particulars, "proceeds of sale of rights, \$271.25, and dividends on stock received by defendants on Sielaff's account, making a total of \$10,999.38, in that connection;" and plaintiff requested that she be permitted to show a deduction of \$176.08, because of net profits on grain transactions, making the net amount claimed of \$10,823.30.

On the third trial the jury returned a verdict for plaintiff, as above mentioned, for \$10,823.30, which is \$200 less than her net claim as made in her new bill of particulars as amended. The evidence introduced, oral and documentary, is voluminous. Plaintiff introduced defendants' complete ledger record of Sielaff's account, and called as witnesses in connection therewith Frank Hegner, defendants' bookkeeper, and George J. Nichol, a public accountant. It appears that from March 15, 1920, until August 25, 1920, Sielaff made through defendants 111 different purchases of stocks, and 87 sales disposing of all the stock purchased (with

one exception), and that all the losses complained of resulted from these trades in stocks. It also appears that from June 7, 1920, until about August 31, 1920, Sielaff made through defendants many purchases and sales of grain for future delivery, and that as a result of all the grain transactions there was a net gain to Sielaff of \$176.08. Over defendants' objection, the court allowed portions of the testimony of Sielaff given on the first trial to be read to the jury by the court reporter, who had taken down his testimony in short hand at the time, from his notes. Some of that testimony was to the effect that in all his stock transactions with defendants (except as to the first transaction in March, 1920, when certain stocks were actually delivered to him) it was not his intention to take or make deliveries of the stocks but only to trade for "differences". There was no evidence, however, that he ever advised defendants of such intention on his part. Other testimony of Sielaff, given on the first trial, was to the effect that during the times of the grain transactions he did not have a warehouse or storage place where he could store 47,000 bushels of corn or 87,000 bushels of oats, and that prior to the transactions with defendants he had never traded with any broker or commission-man, had never before been in a brokerage office, and had never been informed of the rules of the Chicago Board of Trade or of the New York or Chicago stock exchanges. It also appears that on said first trial defendants' attorney waived cross-examination of him. On said third trial plaintiff also called as witnesses William J. Kruger and T. P. Harris, who originally had been made co-defendants with said three co-partners of Bennett & Co., and who were not called as witnesses by Sielaff on the first trial; and on said third trial two of the defendant firm, Frank J. Saibert and James E. Bennett, testified in their own behalf, and their testimony tended to show that said firm, in all its

tradings with Sielaff, had no such intention as testified by Sielaff that such trades should be made only for "differences."

One of the points relied upon by defendants' counsel for a reversal of the present judgment is, that the court erred in admitting over objection any portions of Sielaff's testimony given upon the first trial - he being deceased at the time of the third trial and defendants' attorney not having cross-examined him on the first trial. Although plaintiff's declaration and defendants' pleas thereto were the same at the times of both trials, the issues as defined and limited by the respective bills of particulars on file at said times were different. It is said in McKinnie v. Lane, 230 Ill. 544, 548: "The object of a bill of particulars is to inform the defendant of the claim he is called upon to defend against, and its effect is to limit and restrain the plaintiff, on the trial, to the proof of the particular cause or causes of action therein mentioned." (See, also, Waidner v. Pauly, 141 Ill. 442, 443; McDonald v. People, 126 id. 150, 161.) It is clear from a reading of the bill of particulars of May 25, 1922, (on file at the time of the first trial) that the claim that defendants then were called upon to defend against was the conversion of certain securities. The election of defendants' attorney not to cross-examine Sielaff was apparently determined largely because of the issues as thus limited. When the third trial was had the former claim of Sielaff that certain of his securities had been unlawfully converted by defendants to their own use evidently was abandoned, and a new and different claim was advanced (as disclosed from said new bill of particulars of May 18, 1926) that plaintiff was entitled to recover of defendants because Sielaff's claimed losses were the result of gambling trades or transactions, viz., buying and selling stocks and grain with an

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intention on the part of both parties that there should be no deliveries of the commodities traded in, but that settlements should be made on "differences" only. Because of these facts we are of the opinion that the trial court committed error in admitting any portions of Sielaff's testimony given on the first trial when the issues on the two trials were so materially different. The present record discloses that the trial judge was doubtful whether this testimony was admissible. He said: "There is a question in my mind whether this evidence is admissible or not. I am not sure. If it is not admissible, they are out of court." And we think that our holding that the court erred in admitting said testimony is sustained by the decisions and reasonings in the following cases: London Guarantee Co. v. American Cereal Co., 251 Ill. 123, 131; McInturff v. Insurance Co., 248 Ill. 92, 98; Reed v. Gold, 102 Va. 37, 50; Fosston Mfg. Co. v. Lenke, 44 No. Dak. 343, 346. In the case first cited (251 Ill. 123, 131) it is said: "It may therefore be regarded as the settled law of this state that in order to render the testimony of a witness in a former action admissible in a subsequent action on the ground that the witness has died since giving his testimony, it must appear that both actions involved the same issue between the same parties or their privies, and the fact that the party against whom the testimony is offered in the subsequent action was a party to the former action and had full opportunity to cross-examine the witness does not necessarily render the testimony admissible."

But, assuming that the trial court did not err in admitting said portions of Sielaff's testimony given on the first trial, and considering this testimony together with all the other testimony and all facts and circumstances in evidence, we are of the opinion that there is merit in defendants' counsels' further contention that the

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verdict is manifestly against the weight of the evidence on the question whether both parties intended to engage in gambling trades or transactions in stocks, in which the only losses to plaintiff occurred. In Pelouze v. Slaughter, 241 Ill. 215, 227, it is said: "To make a transaction in stocks a gambling transaction it must appear that neither party intended the stocks to be delivered or intended an actual purchase and sale but that both had the intention of settling on the differences, only." (See, also, Johnson v. Milming, 150 Ill. App. 208, 219; Kerting v. Sturtevant, 191 id. 517, 518.) We have carefully reviewed the mass of evidence bearing upon this question and are convinced from all the facts and circumstances in evidence that the defendants did not have such an intention, and that none of the transactions, resulting in losses to plaintiff, were gambling transactions, and that the verdict and judgment cannot stand.

These holdings render unnecessary a discussion of defendants' counsels' further contentions that the judgment should be reversed because of certain prejudicial remarks made by plaintiff's attorney during the trial which possibly the jury heard, and because of the giving of certain instructions offered by plaintiff.

For the reasons indicated the judgment of the circuit court is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan and Barnes, JJ., concur.

32930

ROSE HORNAT, a minor, by
Frank Hornat, her father
and next friend,
Appellee,

v.

NATIONAL CASH REGISTER
COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY,

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant for \$1500, rendered after verdict on May 11, 1928, in an action for damages for personal injuries received by plaintiff, a little girl of three or four years of age, by being struck and knocked down by defendant's automobile while she was crossing Cottage Grove avenue, south of 92nd street, Chicago, on the afternoon of June 13, 1926.

Plaintiff's declaration consisted of two counts. The first charged general negligence in the operation of the automobile, which at the time of the accident was moving southerly on the west side of Cottage Grove avenue. The second charged that defendant negligently drove the automobile "without having given any reasonable warning of its approach and without having used every reasonable precaution to avoid injuring plaintiff, and without stopping said motor vehicle until it could safely proceed upon approaching a person walking upon or along a public highway, contrary to and in violation of the provisions of the Statute of Illinois in such case made and provided." Defendant filed a plea of the general issue and also a special plea denying its ownership, control or operation of the automobile. Before trial this special plea was withdrawn.

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On the trial two witnesses testified for plaintiff as to the details of the accident. One saw it through a window of his shoe store on Cottage Grove avenue, and the other saw it while driving his truck southerly and immediately behind defendant's automobile. Defendant called three witnesses: Kutak, the driver of the automobile; Hegg, a collector for defendant, sitting on the front seat alongside the driver at the time; and a Mrs. Belle, who at the time was in her car which was standing on the east side of Cottage Grove avenue near said shoe store. The following facts in substance were disclosed: Cottage Grove avenue ran in a northerly and southerly direction. At the place of the accident it was about 65 feet wide from curb to curb, and there were double street car tracks in the center of the street. The district was closely built up and there were stores on each side of the street. Many children were playing on the sidewalks. It was a bright afternoon. Plaintiff, accompanied by another little girl, left the east sidewalk and started to cross the street, southwesterly in a diagonal direction. The other little girl was slightly ahead. When plaintiff was a few feet from the west curb she was struck by the right front fender of the automobile (moving southerly), knocked down, rendered temporarily unconscious and injured on the head and face. The driver of the automobile says that he was seeking a place to park it on the west side of the street. It is evident he did not see the little girls until both had crossed over the car tracks and were in the intervening space between the most westerly rail and the west curb. He did not sound his horn or apply his brakes until plaintiff was immediately in front of his car and about two feet away. The speed at which he was moving apparently was excessive, for, when he finally stopped, plaintiff was lying in the street a

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considerable distance back of the automobile. She was taken to a hospital and there, as well as later at her father's home, received constant medical attention for about six weeks by a physician, Dr. Siemens, who was a witness on the trial. He sustained a laceration across her forehead necessitating the taking of about ten stitches. This laceration caused a permanent scar, discernible at the time of the trial, nearly two years after the happening of the accident.

Defendant's counsel first contends that the evidence does not sufficiently support the verdict on the question of the negligence of the driver of the automobile. We do not think that there is any merit in the contention. And equally without merit, in our opinion, is counsel's further contention that the verdict and judgment are excessive.

Complaint is made of the giving of an instruction, offered by plaintiff, to the effect that, if the jury believe from the evidence that at the time of the accident plaintiff was a child between the ages of three and four years, then she cannot become of her tender years be guilty of contributory negligence. The contention is that the giving of the instruction constituted reversible error because there was no evidence whatever of plaintiff's age. The record does not sustain the contention. It sufficiently appears from the testimony of Dr. Siemens that when he treated her in the hospital she was then a child of about three years of age. Furthermore, defendant's attorney on the trial, in putting a question to the witness, spoke of her as "a child four years of age." It is well settled in this State that a child under seven years of age "is incapable of such conduct as will constitute contributory negligence." (Chicago City Ry. Co. v. Tucky, 196 Ill. 410, 427; Richardson v.

Nelson, 221 id. 254, 257.) and we do not think, in view of the allegations of the second count of the declaration, that the court committed reversible error in the giving of another instruction complained of. Nor do we think that plaintiff's attorney, in his closing arguments to the jury, made such prejudicial remarks as require a reversal of the judgment, as contended.

Finding no reversible error in the record, the judgment appealed from is affirmed.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

32936

LOUIS SCHWARTZ,
Appellant,

v.

MATHIAS HOFFMAN,
Appellee.

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APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit, commenced September 26, 1926, to recover the sum of \$1285.10, there was a finding and judgment in favor of defendant and plaintiff appealed.

The action was based upon a written contract for the exchange of certain pieces of improved real estate in Cook county, signed by the parties on February 11, 1926, and consummated by the delivery of deeds on February 18, 1926. A printed form was used, the blanks being filled out in typewriting, and there were other special provisions written in typewriting or in ink. Defendant agreed to convey his apartment building to plaintiff, subject inter alia to all general taxes levied after the year 1924, and to a first mortgage of \$75,000, and it was provided in two special written clauses, pertaining to defendant's building, that "taxes 1925 and 1926 to date of closing" were "to be prorated as paid for year 1924 upon May 1, 1925," and that "all coal, rent, insurance, taxes, janitors, etc." were "to be prorated at the date of delivery of deeds."

In plaintiff's declaration, after setting out the contract, he alleged that "it was specifically provided that the 1926 taxes were to be prorated on the 1925 tax bill and that defendant

THE
 NATIONAL
 BUREAU OF
 INVESTIGATION

MEMORANDUM FOR THE DIRECTOR

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TO: [Illegible]

FROM: [Illegible]

DATE: [Illegible]

RE: [Illegible]

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14. [Illegible]

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was to pay the 1925 taxes as it would be" (We do not so read the contract); that defendant represented that the taxes for 1925 on his said building would be \$817.70; that at the time the deal was consummated it was impossible to get the correct tax bill from the tax department of Cook county; and that the deal was closed upon the basis that, if there was anything over or under, the difference would be paid. Plaintiff further alleged that defendant knew that the taxes for 1925 had been greatly increased, that in fact they were \$2102.80, and not \$817.70, and that defendant falsely and fraudulently made the aforesaid representations for the purpose of inducing plaintiff to buy the premises; that plaintiff had no knowledge as to what the taxes for 1925 would be, but relied upon defendant's said representation that they would be the same as they were for the year 1924, \$817.70; that subsequently the building and premises, formerly owned by defendant and so conveyed to plaintiff, were sold for taxes and plaintiff had to redeem the same; and that because of defendant's said representations plaintiff has been damaged in the sum of \$1285.10.

Upon the trial plaintiff was a witness in his own behalf and the original contract and certain other writings were introduced in evidence by him. No evidence was introduced by defendant. It appeared from plaintiff's evidence in substance that the taxes on the building in question for the year 1924, as paid by defendant, were \$817.70, which amount was based upon a valuation of \$9,734; that at the time the contract was consummated and the deeds were passed (February 18, 1926) the parties did not know what valuation had been placed upon the premises for the year 1925, but it appeared that the tax rate for that year had been fixed at \$9.05, a slightly

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higher rate than in 1924; that at said higher rate the taxes for the year 1925, at said 1924 valuation of \$9,734, would amount to \$880.93; and that plaintiff at the time of said consummation was credited with \$880.93 for the 1925 taxes, and also with \$120.60, being the pro rata amount of the 1926 taxes for the 49 days of that year up to February 18, 1926. Plaintiff then offered to prove by his own testimony and that of two other witnesses that at said meeting when the deeds were passed defendant verbally agreed that, if it should turn out that the 1925 and 1926 taxes, because of an increased valuation on said building, should be greater for said years than \$880.93 per year, he would pay to plaintiff the proportionate difference. These offers, in our opinion, the court properly refused. We regard them as attempts to vary by parol testimony the terms of the written contract, binding upon the parties and which was consummated substantially in accordance with its terms on February 18, 1926, by the passing of the deeds. Its provisions as to the taxes on defendant's building seem to us to be clear and definite. It is provided that the taxes for the years 1925 and 1926 to date of the closing of the deal were at that time to be prorated "as paid for year 1924," which for said year amounted to \$817.70. As a matter of fact plaintiff was credited, at the time the deeds were passed, on account of taxes on the building, with about \$60 more than he was entitled to be credited by the strict terms of the contract. No evidence whatever was offered tending to show that at the time the contract was signed defendant had been guilty of any false or fraudulent representations whereby plaintiff's signature thereto was obtained. And we think that under the contract and the evidence the finding and judgment for defendant were fully warranted.

Accordingly, the judgment appealed from will be affirmed.
Scanlan and Barnes, JJ., concur.

AFFIRMED.

97a 251 I.A. 618

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

B. A. CRENSHAW,
Plaintiff in Error.

ERROR TO MUNICIPAL

COURT OF CHIC GO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a criminal case, tried without a jury, for claimed violations of certain sections of the Illinois Securities Law, the court on May 2, 1928, found defendant guilty in manner and form as charged in the information, and, after overruling motions for a new trial and in arrest of judgment, entered judgment on the finding and sentenced defendant to confinement in the House of Correction for a term of six months. It is sought by this writ of error to reverse the judgment.

On March 19, 1928, one Ignatz piradek presented to one of the judges of the court an information, consisting of four counts, to which was appended an affidavit, signed and sworn to by him, to the effect that he has read the foregoing information, that the same is true, and that on to-wit, August 27, 1925, there was offered and sold to him at and within the City of Chicago, etc., a certain promissory note for \$10,000 of fictitious value in manner and form as therein set forth. The judge, after examining the information and being satisfied that there was probable cause for filing it, made an endorsement on it to that effect, and ordered that it be filed, that a writ of capias issue against defendant and that he be held to bail. Defendant gave bail, was arraigned, pleaded

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not guilty and elected to waive a trial by jury. On the trial Spiradek was the only witness for the People and defendant testified in his own behalf and he called two other witnesses. All were examined and cross-examined at considerable length. At the conclusion of the evidence, the State's Attorney, recognizing that the evidence did not sustain the averments of the information, asked leave to make certain amendments to the counts on their face instantly. Over objection, the court allowed the amendments to be made, and they were made, but it does not appear that Spiradek subscribed a new affidavit to the information as amended.

We are of the opinion that, because of lack of a new affidavit by Spiradek accompanying the information as amended, the judgment cannot stand. Informations must be sworn to before a warrant can legally issue for the arrest of a person charged with the commission of a crime. (People v. Clark, 280 Ill. 160, 167; People v. Honaker, 281 id. 295, 299.) And the question can be raised on motion in arrest of judgment or on writ of error. (People v. Powers, 283 id. 438, 440.) Although informations, unlike indictments, may be amended (Long v. People, 135 Ill. 435, 441; Bergstrasser v. People, 134 Ill. App. 609, 610); yet where the basis of a conviction is an amended information which is not properly verified by affidavit, such conviction cannot be sustained, as the verification of the original information cannot be applied to the amended information. (People v. Zlotnicki, 246 Ill. 185, 186.) In People v. Lee, 185 Ill. App. 452, 454, it is decided that where an information is presented to the municipal court of Chicago, by a party other than the State's Attorney, it must, under the provisions of the Municipal Court Act, be sworn to by him, and in an affidavit in due form appended thereto and subscribed by him, and that, where

an information is amended in court, it must be re-verified by the prosecuting witness and a new affidavit in due form appended and subscribed by him in the same manner as originally. (See, also, People v. Ross, 243 Ill. App. 427, 423.)

The judgment of the Municipal Court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Canlan and Bernes, JJ., concur.

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251 L.A. 618²

LINCOLN NATIONAL LIFE INSURANCE
CO., a corporation,
Complainant,

v.

JOSEPH DAVID BARRY, ANNA G. BARRY
and ANNA V. BARRY,
Defendants.

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

On appeal of ANNA V. BARRY

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On February 8, 1927, the complainant company filed a bill of interpleader in the superior court of Cook county. After answers filed there was a hearing before the chancellor and on May 12, 1928, a decree was entered in favor of the defendants, Joseph David Barry (hereinafter called Joseph Barry) and Anna G. Barry, and against the defendant, Anna V. Barry, who has appealed.

It appears from the undisputed allegations of the bill that in December, 1919, and January, 1920, complainant issued two insurance policies of \$5,000 each on the life of Gerald Barry, then the husband of the defendant, Anna V. Barry; that she originally was named as beneficiary in both policies, but on December 7, 1922, changes were made so that both policies were payable to the insured's estate; that on February 26, 1923, Anna V. Barry obtained a divorce from Gerald Barry; that on January 15, 1925, the beneficiary in one of the policies was changed from his estate to said Anna V. Barry, and thereafter, on July 2, 1925, again changed to the defendant, Joseph Barry, a brother of Gerald Barry; that on January 15, 1925, the beneficiary in the other of the policies was changed

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from his estate to the defendant, Anna G. Barry (sister of the insured), to the extent of the sum of \$1,000, and to Anna V. Barry to the extent of the sum of \$4,000, and that, thereafter, on July 2, 1925, a further change was made so that Joseph Barry became the beneficiary to the extent of \$4,000; that Gerald Barry died on December 13, 1926, and due proofs of death were made; that there is due and payable on the two policies, after making proper deductions for unpaid premium notes, loans, etc., the net sum of \$9,155.73; that Anna V. Barry has demanded payment of the whole of said sum, and Joseph Barry and Anna G. Barry claim the same according to their respective interests; and that complainant is ready to make payment but does not know to whom to make it with safety to itself, and, therefore, tenders the same in open court, etc. Thereafter the court ordered the sum deposited with the clerk of the court until further order.

The defendants, Joseph Barry and Anna G. Barry, filed a joint and several answer to the bill, claiming the whole of the sum according to their respective interests. Attached to their answer is a copy of the decree of divorce. From portions of the decree (subsequently introduced in evidence) it appears that Anna V. Barry was awarded the custody of their six children, all then minors; that she held title to certain improved real estate in Chicago (the family home) upon which there was a mortgage of \$4500, which the court ordered that Gerald Barry pay within a reasonable time; and that Anna V. Barry also was awarded, for alimony and for the support of the children, the sum of \$225 per month, and Gerald Barry was ordered to make such monthly payments, commencing February 1, 1923, until further order.

In the answer of Anna V. Barry she alleged that shortly

prior to the last purported changes of beneficiary in the policies on July 2, 1925, Edward Becht (or Beck), whose wife is the sister of Gerald and Joseph Barry, obtained possession of the policies from this defendant by false and fraudulent representations to the effect that he wanted to consult with the officials of complainant and be sure that her interests as beneficiary were protected, that upon ascertaining this he would return the policies to her, but that he never returned them, although often requested; that she never knew until after Gerald Barry's death that said changes had been made; that shortly after the entry of the divorce decree he returned to the family home and continued to live there until January 6, 1925, when he became ill and was taken to a hospital where he remained until April 21, 1925; that thereafter and until his death he made his home with the Becks in their apartment, although he continued to have friendly relations with this defendant and the children, visiting them frequently in the afternoons, evenings and on Sundays; that after July 2, 1925, Edward Beck objected to their coming to the Beck apartment and on several occasions refused them admission; that Gerald Barry only paid the first two installments of the alimony as provided in the divorce decree, and that he failed to make payments on the mortgage on the family home; that at the time of his death he owed this defendant, for alimony and for moneys paid by her on the mortgage, the total sum of about \$13,000; and that the disease from which he suffered was diabetes. She also made allegations tending to show that Joseph Barry, Anna G. Barry and Edward Beck conspired to defraud her out of the insurance money that would become payable on Gerald Barry's death; that they exercised undue influence over him; that when he signed the papers on July 2, 1925, effecting said changes of beneficiary, his mind and memory were so impaired as to render him

mentally incapable of knowing or realizing what he was doing, and incapable of making any valid changes of beneficiary. She prayed that such changes be declared null and void and that all moneys due upon the policies be paid to her.

Following the filing of the answers the court entered an order, finding that complainant's bill of interpleader was properly filed and directing that the respective defendants settle the matters in controversy between themselves in this suit.

On the hearing Anna V. Barry contended that the changes of beneficiary made on July 2, 1925, were void and of no effect, for the reason that at that time, and for several months prior thereto and thereafter, Gerald Barry's mental faculties were so impaired as to render him mentally incapable of executing any papers effecting such changes or conducting any business. On this issue she was a witness in her own behalf, and she called many other witnesses, including Mrs. Flora Hoyt, and three of the children, Gerald Barry, Jr., (aged 17 years), Helen Barry (aged 19 years), and Mary Barry (aged 20 years). Their testimony tended strongly to establish Mrs. Barry's contention; and the other defendants, Joseph Barry and Anna G. Barry, although they testified as witnesses on other matters, did not introduce any contrary testimony on this issue. Neither Edward Beck nor his wife were called as witnesses. Mrs. Barry also contended that Gerald Barry's signatures to the papers were effected through the undue and fraudulent influence of Joseph and Anna G. Barry, but, in our opinion, the evidence fails to sufficiently support the contention. The court in the decree found against Mrs. Barry on both contentions, specifically finding that "all of the assignments and changes of beneficiaries, made or effected by Gerald Barry in his lifetime, with reference to said insurance policies, were valid, lawful

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assignments and changes;" that "there was no fraud, undue influence or duress" used "by or on behalf of" Joseph or Anna G. Barry to induce Gerald Barry to execute said assignments and changes; and that Gerald Barry made them "of his own free will and volition," and, when he made them, "was at all times in possession of all his faculties," and "was of sound mind and had mental capacity sufficient to understandingly make said assignments and changes." And the court decreed that out of the \$9,155.73 deposited, the clerk of the court, as to one of the policies, pay to Anna G. Barry the sum of \$1,000, and to Joseph Barry the sum of \$3,504.35, in full satisfaction of their respective claims against complainant; and that, as to the other of the policies, the clerk pay to Joseph Barry the further sum of \$4,650.83, in full satisfaction, etc.

Gerald Barry was 53 years of age at the time of his death, December 13, 1926. For many years he had been an attorney-at-law in Chicago, but for about two years prior to his death, because of his illness from diabetes, he did very little work at his profession. Prior to the divorce, he and Anna V. Barry had lived together as husband and wife for many years. Thirteen children had been born to them, of whom six were living at the time of the trial - the eldest being 20 years of age. Notwithstanding the divorce, he continued thereafter to live at the family home, with Anna V. Barry's consent, until he went to the hospital in January, 1925. As she testified "he never seemed to realize that he was divorced." He only paid the first two monthly installments of the alimony awarded. He made no attempt to pay off the mortgage on the home and probably was unable to make any payments thereon. The home had to be sold in September, 1925, and Anna V. Barry and the children took up their abode elsewhere. In April, 1925, and until his death, he lived with

the Becks in their apartment. It was there that he executed the papers on July 2, 1925, purporting to authorize the changes in the beneficiaries in the policies. Mrs. Flora Hoyt, who lived in the same apartment building across the hall, was called in by Mrs. Edward Beck to witness Gerald Barry's signatures.

Mrs. Hoyt testified in substance that she became acquainted with Gerald Barry in April, 1925, just after he returned from the hospital; that he then and thereafter appeared to her to be sickly and feeble; that prior to July, 1925, she frequently saw and conversed with him; that "he did not seem like a man who had his own mind;" that on one occasion, meeting him on the street, he appeared to be lost and not to know how to go to the Beck apartment and she accompanied him there; that in playing cards with him, Mrs. Beck and others, he at times did not appear to know what he was doing; that on the morning of July 2, 1925, Mrs. Beck requested her to come into the apartment and "sign a paper on a business transaction;" that she complied with the request and signed certain papers as a witness to Gerald Barry's signatures but did not at the time know what the papers were; that upon entering the room she "found Mr. Barry's brothers, Mrs. Beck and Mr. Gerald Barry there;" that Gerald Barry was sitting at the side of a table, "leaning on his hands," and did not appear to recognize her (Mrs. Hoyt); that at his brother's request he signed two papers and she signed them afterwards as a witness; that "he did not appear to know what he was doing;" and that in her opinion he was of unsound mind at the time. Mrs. Hoyt further testified as to frequent meetings with him thereafter and prior to his death, and as to various happenings, all of which tended to show a continued unsound condition of mind.

Anna V. Barry testified that, after Gerald Barry left the

hospital and went to live with the Becks, and prior to July 2, 1925, he frequently visited her and the children at the family home, and took many meals with them; that on some occasions he spoke of, and was apparently much worried over, a certain cattle ranch, which since his illness in the hospital he said he had forgotten the location of; that he claimed that all his money was in prize cattle on the ranch; that so far as she knew, or could ascertain from inquiries from other parties, he had no interest whatever in any such ranch; that on other occasions he showed interest in certain pieces of furniture in the home, thinking that they were new, but which were in fact pieces which he himself had purchased in prior years; that on other occasions he did not recognize some of the children as being his, and he was constantly addressing them by the wrong names; that on some occasions he seemed to realize his mistakes concerning them and would refer to his illness in the hospital and say that now he "didn't remember well;" that on other occasions there were conversations, in which the elder children participated, about the mortgage on the home and the necessity of making payments on it to prevent its foreclosure, but that he did not appear to realize the situation or know who was the owner of the home; that on some occasions he expressed inability to know the direction to go to reach the Beck apartment and requested that one of the children accompany him there, which one of them always did; that on one occasion in June, 1925, when the outer doors were locked and the witness and some of the children were upstairs he suddenly there appeared, having entered through a window, and, upon being requested always to ring the bell before entering, wanted to know where the bell was, which at the front door he had many times himself rung before; that on the afternoon of July 4, 1925, (two days after he had executed said papers) after having tea, he went upstairs for

a nap and later came down the stairs "stark naked;" that upon being asked by the witness, in the presence of Helen Barry, where his clothes were, replied that he "hadn't got any clothes" and that the witness and Helen found the clothes in a different room from that in which he had first lain down for his nap, and dressed him. The witness further testified as to many other conversations with him, and unusual happenings, occurring thereafter and up to the time of his death, all tending to show that his mental infirmities increased as time elapsed. She further testified that after July 2, 1925, she had several conversations with him, in the presence of some of the children, regarding the policies, and as to Beck's failure to return them to her and that he expressed surprise, but told her not to worry as she was the named beneficiary therein and when he died she would get the insurance money and nobody could take it away from her. She expressed the opinion that he was "mentally unbalanced" from the time he came out of the hospital in April, 1925, until his death, and that at the time he signed said papers on July 2, 1925, he "was not right in his mind" and was incapable of then realizing the full import of what he was doing.

The chancellor, in an oral opinion delivered just before the entry of the decree, referred to the three children, who testified at great length upon the hearing, as "fine, bright children." Their testimony corroborated that of their mother in all essential particulars and tended strongly to show that, from the time their father left the hospital in April, 1925, and until his death, and particularly in the months of June and July, 1925, his mind and memory were so impaired as to render him incapable of performing any business transaction, or of realizing what he was doing when he signed the papers in question on July 2, 1925. The testimony of the oldest child, Mary Barry, who during said period was working in the office

of the Yellow Cab Co., Chicago, and who saw and conversed with her father during many of his evening visits at the family home, and upon other occasions and at other places, is particularly illuminating on the issue as to his impaired mind and memory and his mental incapacity generally.

Charles A. Williams, an attorney-at-law, testified that he was well acquainted with Gerald Barry for more than 20 years prior to his death, and saw him frequently; that shortly after he came out of the hospital in April, 1925, the witness had a conversation with him on the street; that Barry appeared ill and feeble and at first did not recognize the witness; that later he said that he "did not know what he was doing most of the time" and that while in the hospital he "had been in a coma," and had "broken all records" as to his particular disease - diabetes; that about a month later he called at the witness' office and said that he "was looking for his property," and upon being asked for particulars, said "I have been very sick and it seems that I have disposed of a lot of property and I don't know what I have done with it;" that in the month of July or August, 1925, the witness again met him on the street and asked him about a certain criminal suit that they had tried together as attorneys shortly before Barry went to the hospital, and that Barry said he "remembered nothing about the case." The witness expressed the opinion that at each of these times Barry's "mental condition was unsound." James R. Glass, a U. S. Commissioner, before whom Barry prior to his illness had frequently appeared representing defendants, testified as to conversations had with him in August and during the fall of 1925 and spring of 1926, and, after stating what they were, expressed the opinion that at those times Barry "did not have control of his mind and memory." Sylvester Brissa, a relative of Barry,

testified as to conversations with him in May, June and August, 1925; that at the first conversation the witness mentioned a case which Barry before he went to the hospital had tried for a client and that the client had said he still owed Barry some money for services; that Barry, after thinking for a while, said: "He does owe me money in that case - about \$9,000; there are lots of people who owe me money, but I cannot think who they are; I have lost my mind entirely;" that in the June conversation the witness told him he had procured a client for him who had a case soon coming up in the Federal building, that an appointment was made to meet the client at a particular time and place, but that Barry failed to keep the appointment and that afterwards he said to the witness: "I never gave it a thought; it slipped my mind." Other witnesses testified to conversations with Barry and to certain happenings occurring after July 2, 1925, all tending to show his continued and increasing mental incapacity.

Joseph Barry, living at Memphis, Tennessee, at the time of the hearing, testified that he paid for the care, medicine, nursing and keep of Gerald Barry while the latter lived with the Becks, and also the undertaker's bill for his burial; and that from time to time he had paid premiums on the two policies amounting in the aggregate to "about" \$1300. It appears from the uncontradicted testimony of Anna G. Barry that the reason for the change of beneficiary in one of the policies to her to the extent of \$1,000 was a previous loan of \$1,000 by her to Gerald Barry. F. I. Brockius, a young woman cashier of the complainant in its Chicago office, testified that during the sicknesses of Gerald Barry and after April, 1925, Joseph Barry personally paid the premiums falling due upon the policies; that she only saw Gerald Barry once and that

was in the fall of 1926; and that on that occasion he called at complainant's office, asked about the policies and to whom they were payable, was given the information and "he wrote it down." It further appears that in September, 1926, Anna V. Barry, upon the advice and assistance of one of the attorneys for the Yellow Cab Co., whom she consulted, filed her sworn petition in the divorce case, alleging that Gerald Barry was in arrears in payment of alimony to the extent of \$9,600, and praying for a rule upon him to show cause why he should not be adjudged in contempt, etc.; that such a rule was entered; but that thereafter no further proceedings were had in the matter and no contempt order was further urged or entered. She also gave testimony to the effect that about this time the family were in very straitened circumstances financially, that she had been unable to see Gerald Barry and had been refused admittance to the Beck home where he was; that, acting upon her attorney's advice, she took this means of obtaining an interview with him, etc.; and that she knew at the time that he was financially unable to make any payments on account of alimony due.

From said oral opinion of the chancellor it appears that, notwithstanding the uncontradicted testimony of Anna V. Barry, her children and the other witnesses for her, disclosing the mental incapacity of Gerald Barry on July 2, 1925, and shortly prior and subsequent thereto, to transact ordinary business affairs, and his weakened mental condition, the court was of the opinion in substance that, because of certain allegations in Mrs. Barry's sworn petition in said contempt proceedings, in some particulars inconsistent with some of her testimony upon the hearing, she was not entitled in a court of equity to recover anything upon the policies. The chancellor said in part:

"Now, in order to justify this court in setting aside the changes of beneficiary designated by the insured, the court must be satisfied from the evidence that at the time the changes were made said insured was incapable of understanding, and didn't understand, the acts that he was about to and did perform. The court is obliged to take the record as a whole. In view of the former wife's petition, and of the testimony of this young woman cashier of the company, indicating that when he appeared at its office he understood things, understood that he had insurance policies, understood that he had made changes in beneficiary, and wanted to know just how the company had made the changes (which is all contradictory to the testimony of witnesses who appeared and testified as to their belief, from acts they noticed, that he had not sufficient mental capacity to transact business), * * * I will enter an order decreeing that the brother and sister are entitled to this money, because of changes of beneficiary, and deny the right of the former wife to participate in the fund."

We cannot agree with the court's reasonings or conclusions.

We do not think there is a question of equitable estoppel in the case, because of Mrs. Barry's sworn petition in the contempt proceedings. Furthermore, the testimony of F. I. Brokius, the woman cashier of complainant, does not in our opinion justify the inferences that the chancellor drew therefrom. She had no lengthy conversation with Gerald Barry at the time, and she expressed no opinion as to his then mental condition or capacity. The question before us for decision is entirely one of ultimate fact, and, after a painstaking examination of all the evidence, we are of the opinion that on July 2, 1925, when Gerald Barry signed the papers authorizing said changes of beneficiary, he was not of sound mind, was not capable mentally of transacting ordinary business matters, and not capable mentally of making said changes and understanding at the time what he was doing. And we think the court erred in entering the decree appealed from.

The uncontradicted evidence, however, discloses that the naming of Anna G. Barry, sister of the insured, as beneficiary in one of the policies to the extent of \$1,000, was done at a time prior

to the insured's serious illness which resulted in the impairment of his mental powers, and in consideration of and as security for, a bona fide loan made by her to him, and it is equitable and proper in our opinion that she recover \$1,000 out of the fund in the clerk's hands, less a proportionate amount occasioned by the proper claims of the company as against the face value of the policy. and the evidence also discloses without contradiction that Joseph Barry paid, out of his individual funds, for due premiums on the policies considerable sums of money, the exact aggregate amount of which does not appear, but which he claims was "about" \$1300. We think that in equity and good conscience he should be reimbursed out of the funds in the clerk's hands for these payments without interest.

For the reasons indicated the decree of the Superior court is reversed and the cause is remanded with directions that the court hear further evidence and ascertain how much Joseph Barry actually paid in premiums on the policies; that, upon the aggregate sum being ascertained, the court order it to be paid to him without interest by the clerk of the court out of said fund; that the court also order to be paid to Anna G. Barry out of said fund the sum of \$1,000, less deduction as aforesaid; and that the court also order to be paid to Anna V. Barry, former wife of Gerald Barry, out of said fund the balance in the clerk's hands. The costs in this appellate court and in the Superior court will be taxed against the appellees, Joseph Barry and Anna G. Barry.

REVERSED AND REMANDED WITH DIRECTIONS.

Seanlan and Barnes, JJ., concur.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

32992

EDWARD ROPP and F. L. HANKS,
doing business as Marvel Motor
Co.,

Appellees,

v.

JOHN W. BARNES,
Appellant.

251 A. 618³

APPEAL FROM MUNICIPAL
COURT OF CHIC GO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 14, 1927, a judgment by confession for \$45, (\$10 for attorney's fees) was entered against defendant on a written contract signed by the parties on June 25, 1927, a copy of which was attached to and made a part of plaintiffs' statement of claim. Plaintiffs agreed therein to furnish and install in defendant's premises at 4521 South State street, Chicago, a "Marvel Booster Pump," and defendant agreed to pay to plaintiffs therefor the sum of \$35 on July 25, 1927, and plaintiffs guaranteed among other things that the pump would increase the water pressure sufficient to force water to the top floor of the building, which guarantee, however, was contingent upon defendant keeping the pump and motor oiled. The contract contained the usual clause authorizing a confession of judgment against defendant for any unpaid amount of the contract price, together with costs and reasonable attorney's fees.

Defendant was not advised of the entry of the judgment until December 30, 1927, when execution thereon was presented to him, and on January 8, 1928, he appeared and moved to vacate the judgment, supporting his motion by affidavit. He stated therein that the contract did not show upon its face that any money was

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due thereon to plaintiffs and that to determine that fact it was necessary for plaintiffs to show by evidence that their guaranties had been complied with. He further stated that he had a good defense upon the merits to the whole of plaintiffs' demand, in that the pump as installed did not in fact increase the water pressure sufficient to force water to the top floor of the building, although he had kept the pump and motor oiled.

The court refused to vacate the judgment as confessed, but ordered that it be opened (the same to stand as security), and further ordered that defendant's said affidavit stand as an affidavit of merits. In April, 1928, there was a trial without a jury, resulting in the court adjudging that said judgment for \$45, as confessed on October 14, 1927, stand confirmed. This appeal followed. Appellants have not filed a brief in this court.

After considering the provisions of the contract in question, we are of the opinion that the court erred in not granting defendant's motion to vacate the judgment entered by confession. We think that, because of plaintiffs' guaranties contained in the contract (which was the basis of the confessed judgment), it could not be determined without the hearing of evidence whether the pump actually complied with said guaranties, and whether defendant in fact owed plaintiffs any money on the contract. In Little v. Myer, 138 Ill. 272, 278, it is decided in substance that the entry of a judgment by confession is not warranted where the amount of the judgment is not definitely fixed and depends upon the hearing of evidence dehors the obligation upon which it is based. (See, also, Weber v. Powers, 213 Ill. 370, 383.) Furthermore, we do not think that the court upon the hearing was justified by a preponderance of the evidence in confirming the confessed judgment, even upon the

[illegible]

erroneous theory that it was properly entered in the first instance.

For the reasons indicated the judgment appealed from is reversed, and the cause is remanded with directions that the court order the vacation of said confessed judgment of October 14, 1927.

REVERSED AND REMANDED.

Scanlan and Barnes, JJ., concur.

THE UNIVERSITY OF CHICAGO

CHICAGO, ILL.

DEPARTMENT OF CHEMISTRY

RECEIVED

APRIL 10, 1950

CHICAGO, ILL.

TO THE EDITOR

YOUR LETTER OF APRIL 10, 1950

33003

ROSALINA SOLDATO,
Appellee,

v.

CONGREGAZIONE DI MUTUO
SOCCORO SAN ROCCO DI
MOLUGNO, a corporation,
Appellant.

251 - A. 6184

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDENT JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

In an action to recover a "death benefit" because of the demise of plaintiff's husband, Giuseppe Soldato, a member of defendant society, on February 4, 1928, there was a trial without a jury in June, 1928, resulting in the court finding the issues against defendant, assessing plaintiff's damages at \$650, and entering judgment in that amount upon the finding against defendant. This appeal followed.

The defenses of the society as stated in its affidavit of merits, were (1) that although it had duly been incorporated under the laws of the State of Illinois on November 5, 1920, and had acted as a corporation, it had ceased to be such prior to February 4, 1928, and was incapable of suing or being sued as such, and (2) that the deceased, Giuseppe Soldato, was not a member of the society in good standing at the time of his death, and, hence, that it was not liable to plaintiff in any sum. Defendant did not sustain by sufficient proof upon the trial the first mentioned defense. As to the second, it appeared from a clear preponderance of the evidence, as found by the court, that deceased was a member in good standing on January 22, 1928,

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and that the officers of the society treated him as being in good standing when his death occurred by attending his funeral and contributing out of the funds of the society to the funeral expenses.

The by-laws of the society, introduced in evidence, provided inter alia that (a) "the mortuary capita tax shall be paid in advance, and who has not paid same, in case of death, shall have no rights whatever;" (b) "the members (males) in case of death for contribution shall pay \$2 per capita, and the sisters \$1; in case of the death of a member (male) or a sister, besides the contribution per capita, the congregation will pay out of its treasury - if a man \$40, and a floral piece, \$10; if a woman \$20, and a floral piece, \$5;" (c) "the member who for three consecutive months is behind with his payments loses the right to the floor, to the vote and to the sick benefit; after five months, that is from the date of the meeting, he will lose every benefit given by the corporation." It is plain that, the deceased being in good standing on January 22, 1928, a few days before his death, the society was liable to plaintiff for the payment of a death benefit.

But the amount of the benefit to be paid is dependent upon the number of living members, male and female, of the society at the time of the death of the particular member. Two dollars is to be contributed by each living male member and one dollar by each living female member. The court found that at the time of the death of plaintiff's husband there was a total membership of 325 persons, and plaintiff's damages were fixed at \$2 per member, or \$650. We think that the court's finding and judgment are excessive. It appears from the testimony of Tony Lemaro, treasurer of the society, that on February 4, 1928, there were "about 200 men and 75 women

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in the whole society." On this basis, and considering that the men members under the by-laws were to contribute \$2 each and the woman members \$1 each, the total contribution could not exceed \$475. The evidence does not definitely disclose that there were 325 members. The error may be cured by a remittitur.

Accordingly, if within ten days plaintiff will file in this court a remittitur of \$175, the judgment of the municipal court will be affirmed for \$475; otherwise it will be reversed and the cause remanded. Inasmuch as defendant perfected the present appeal on the theory that it was not liable to plaintiff in any amount, the costs in this court and in the municipal court will be taxed against it, if plaintiff files the remittitur.

AFFIRMED ON REMITTITUR FOR \$475;
OTHERWISE REVERSED AND REMANDED.

Scanlan and Barnes, JJ., concur.

32388

ANTON LEPA,
Plaintiff in Error,

v.

W. W. KRAMM et al.,
Defendants in Error.

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\$500.00
A. 619
APPEAL TO CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The judgment under review was rendered in a replevin suit to recover possession of an automobile in which the court, before whom the case was tried without a jury, found defendants not guilty, and awarded a writ retorno habendo to defendant Kramm.

To the declaration containing a count for wrongful taking and a count for wrongful detention in the usual form, defendants filed joint pleas of the general issue and pleas of their ownership of the property. One of the latter pleas set out by way of inducement the facts on which defendant Kramm claimed ownership of the automobile through a foreclosure sale had under a chattel mortgage on the same given by one Lucas, plaintiff's vendor.

Plaintiff's replication alleged that the owner of the mortgage authorized Lucas to sell the automobile, and that he was engaged in the business of selling automobiles and sold the automobile in question to plaintiff in the ordinary course of business, and that plaintiff had no notice of a mortgage. A rejoinder denied the matters set up therein and the alleged authorization.

These matters of inducement were not traversable, and

formed no part of the issue to be tried. In such a case the pleadings merely put in issue the plaintiff's right to the property, and the burden was on him to establish it. (Constantine v. Foster, 57 Ill. 36; Reynolds v. McCormick, 62 id. 412; See A. Chapell Co. v. Pennsylvania Co., 291 id. 248.) The only material question before us, therefore, is whether plaintiff sustained such burden and whether the court's finding, as contended by plaintiff in error, was against the weight of the evidence.

Plaintiff made out a prima facie case of right to the property by proving his purchase thereof from one Lucas in August, 1927, without knowledge or notice of any mortgage thereon. He attempted to rest his case on such proof but on an erroneous ruling that the burden was on him under the pleadings to prove the mortgage he introduced further proof to the effect that on May 11, 1927, Lucas purchased the automobile from his employer, one Ladewig, and gave a chattel mortgage thereon, of which defendant Automobile Bonding Company became the owner, and that the latter authorized Lucas, who was engaged in selling automobiles, to sell the automobile. Plaintiff, however, did not attempt to introduce the mortgage itself in evidence or to make any proof respecting the acknowledgment or recording of the mortgage, or of any facts that would give it validity. On cross-examination of one of plaintiff's witnesses he identified the signature of Lucas thereon, whereupon defendant asked to have the mortgage marked as an exhibit for identification. But it was never offered in evidence then or afterwards, nor was there any proof made of the acknowledgment or the recording thereof.

Defendants, evidently erroneously assuming from the pleadings and such identification that the mortgage was in evidence, restricted the defense mainly to the question of authorization to sell the

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

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7-10-68

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THE CHAIRMAN: I have a question for Mr. [REDACTED].

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Journal of Interpersonal Violence 26(10) 1978-1997
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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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mortgaged car, and the court's finding was evidently based on evidence relating to that subject and to whether Lucas sold the car in the ordinary course of the business of selling automobiles.

Plaintiff having made proof of his purchase of the automobile without actual notice of the mortgage made out a prima facie case of his right to the property, regardless of the fact of authorization or whether the vendor was engaged in the business of selling automobiles; and to overcome it it was necessary that defendants make proper proof that the mortgage referred to was duly executed, acknowledged and recorded, otherwise it would be invalid as to third parties dealing with the possessor of the automobile (Kimball Co. v. Polakow, 268 Ill. 344, 348), and would not be notice to the purchaser. (Jensen v. Ilcox Lumber Co., 295 id. 294, 295; Whrlich v. Chapple, 311 id. 467, 469; Cash Register Co. v. Wiley Advertising System, 329 id. 403.)

As the original bill of exceptions merely showed that a paper purporting to be a mortgage was marked for identification but that no formal offer in evidence of the same was made defendants procured an order at a subsequent term of court amending the same by inserting therein said mortgage and accompanying note as exhibits received and considered in evidence at the trial.

The order expressly recites that the court found nothing in its minutes, memorandum, notes or the files or records of the court "except as may be indicated by the bill of exceptions as originally approved," relating to the formal introduction of said exhibits, but certified to what there is nothing whatever in the original bill of exceptions on which to base the conclusions, namely, that it "considered said exhibits as having been offered and received

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in evidence, that said cause was tried and heard by the court and argued by counsel of the respective parties and decided by the court upon the theory that said exhibits had been in fact offered and received in evidence and that said exhibits in question were before the court on trial and were considered by the court." The order then proceeds to recite other matters, which like the conclusions already referred to, rested clearly on the court's mere recollections, as the necessary facts on which to predicate them are not recited in and do not appear in the bill of exceptions. It is fundamental that the court cannot amend the record at a subsequent term merely from the personal recollections of the trial judge. An examination of the original bill of exceptions, which speaks for itself, and on which the amendment purports to have been based, discloses no basis for the conclusions and findings thus set forth in the court's order.

The court could not properly consider the mortgage in evidence merely because it was marked for identification, nor without it was offered in evidence unless it was expressly admitted or treated as such by plaintiff. But the original bill of exceptions does not contain the arguments before the court nor any remarks of court or counsel or rulings to support the inference of any such admission or attitude on the part of plaintiff's counsel or to support the findings on which the amendment rests. The exhibits, therefore, inserted by such amendment are not properly in the record and will be stricken therefrom.

There being no proof of the acknowledgment and recording of the mortgage, and consequently no proof of notice thereof to plaintiff, his proof of right to the property was not overcome and the court's finding was against the weight of the evidence. The

Judgment will therefore be reversed and a judgment entered here for plaintiff in error, with a finding of fact that the right to possession of the property in question is in him.

W. V. C. L. M. JULIAN W. H. M.

Gridley, F. J., and Scanlan, J., concur.

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32388

FINDING OF FACT.

We find that the right to possession of the property in question, taken on the replevin, is in plaintiff in error. Anton Leda.

1. The first step is to identify the problem. This involves understanding the current situation and what needs to be changed.

32933

E. J. WENTZEL & COMPANY,
a corporation,
Defendant in Error,

v.

CHARLES ATKINSON,
Plaintiff in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This writ seeks review of a judgment for \$1327 entered on a finding of the court in favor of the plaintiff to the action.

The ground of action, which the evidence fully supports, is that at defendant's special order and request plaintiff purchased 100 shares of certain capital stock for \$1300, that he has tendered and always been ready, able and willing to deliver the same to defendant and that defendant has refused to pay for the same, although he has often promised so to do.

By his affidavit of merits defendant denied giving a special order or request and ever agreeing to pay for the stock, and later by amended affidavit of merits pleaded the statute of Frauds, alleging that the transaction was a sale of choses in action of the value of \$500 and upwards, and negatived the existence of any of the facts enumerated in section 4 of the Uniform Sales Act that would otherwise take the case out of such statute.

No evidence was offered or received in behalf of defendant. Defendant's counsel made application for a continuance, but as he did not support his application by an affidavit, as provided by section 62 of the Practice Act, there was no error in denying it.

Because the agreement relied on by plaintiff was oral it is urged that it is not enforceable under said section 4 of the Uniform Sales Act.

The transaction was not one of a sale of stock by plaintiff to defendant but merely a contract of agency whereby plaintiff was to procure the stock in question for defendant, not in the capacity of broker but merely as his agent, and by way of a temporary loan, was to advance the purchase price therefor. Such an agreement is enforceable without being in writing. It was not one between a vendor and vendee such as is contemplated by the pleaded statute. For the same reason the contention of plaintiff in error that the rule of damages applicable was that for a breach of contract for the purchase and delivery of capital stock where the purchaser fails to accept the same is untenable.

Plaintiff carried out his agency. He bought the stock for defendant, tendered delivery thereof, and, as the evidence tends to show, kept the tender good. In fact no issue was taken on the question of tender. The cause of action, therefore, reduces itself merely to one to recover money advanced or loaned for the benefit and use of defendant, together with interest thereon.

Complaint is made that plaintiff's counsel testified in its behalf. His testimony was entirely unnecessary to sustain the cause of action and therefore could have been disregarded.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

32943

B. H. CROWEN,
Defendant in Error,
v.
HYMAN MEYER and ROSE MEYER,
Plaintiffs in Error.

1919
APPEAL TO CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The decree under review confirmed a master's report finding that complainant was entitled to a lien on certain premises belonging to defendants, and ordered a foreclosure sale of the same in default of payment of the amount claimed by complainant for his services as architect.

The facts are undisputed, no evidence having been offered before the master by the defendants.

The decree found, in accordance with the master's report, that complainant was hired by defendant Hyman Meyer as an architect pursuant to a contract described in the bill; that the contract was entered into with the full knowledge and consent of one Sopkin, who was the owner of the premises at the time of its execution and subsequently conveyed them to defendants; that complainant prepared the plans and specifications for the erection of the building on said premises, which, as originally prepared and subsequently changed, were approved and accepted by defendant Hyman Meyer; that the lowest bid complainant received for the building was \$45,800, and that complainant was entitled to a lien on said premises in the sum of \$1423.60, with interest from the date of filing his claim.

The terms of the contract were contained in a letter to complainant signed by defendant Hyman Meyer. It authorized and directed complainant (a) to prepare plans, specifications and necessary drawings for the erection and completion of a building on two certain lots; (b) to procure estimates for the construction; (c) to let contracts for the same with the written consent of said Meyer; (d) to superintend the work of construction; (e) to issue vouchers to those entitled to the same under the contracts and to complainant for his services. The letter then read:

"I hereby agree to pay you a sum equal to six (6%) per cent of the total cost of the aforesaid building and appurtenances thereof, payable in the manner following:

Three per cent at completion of plans and specifications and balance in proportion as contractor's certificates are issued.

All labor or materials furnished by me for use in the construction of the aforesaid building and appurtenances, shall be included in the aggregate cost thereof, and be subject to your commission as aforesaid."

The evidence on which the court's finding as to the amount of the lien was based was to the effect that by a rule recognized by the American Institute of Architects, and the Illinois Society of Architects, an architect is entitled to 7/10 of the entire fee for the plans and specifications and taking bids, and 3/10 for superintending construction. On such testimony complainant claimed and was allowed 7/10 of 6 per cent of the amount of such bid (for which a contractor agreed to finance the entire cost of the building), amounting to \$1923.60, on which defendants were given credit for a payment of \$500 on account, making the sum of \$1423.60 aforesaid.

Regardless of any other points raised for reversal it is obvious that the decree must be reversed on the ground that complainant's contract was entire in its nature and as the compensation therein provided for cannot be apportioned to the

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services called for, whether or not they included elements not covered by the Mechanic's Lien Act, the contract is not enforceable under said Act. The 6 per cent compensation complainant was to receive under the contract was not for services in preparing plans and specifications alone but called for the performance of other services as above enumerated. Whether or not all of the services thus to be performed for such compensation can be said to be incidental to those usually performed by an architect and are comprehended in the statutory phrase "perform services as an architect," (section 1 of said Act) it is unnecessary to consider if it cannot be ascertained from the contract what portion of the 6 per cent was to be paid for the actual services rendered, and what was to be paid for those not performed. The lien claimed and allowed was for preparing plans and specifications. But the contract does not apportion any particular part of the compensation complainant was to receive for such services, and it cannot be ascertained therefrom what part of the entire contract price of 6 per cent was for preparing plans and specifications and what part was for the remainder of the work to be performed. For this reason the lien cannot be enforced for any part of the work. (Cronin v. Tatge, 281 Ill. 336; Adler v. World's Pastime Exposition Co., 126 Ill. 373.) As said in the latter case cited in the former, "the contract cannot be enforced as to that part of the labor performed for which a lien is conferred by the statute because the contract is entire, and an entire contract cannot be apportioned and the performance of it enforced in fragments."

Whatever be the rule of the architects associations relied upon - whether competent evidence or not - such rule could not change the nature of the contract as to its being entire and not apportionable.

Nor is such construction of the contract affected by the provision for payment of half of complainant's fee or compensation on completion of the plans and specifications, it not providing that such payment shall be for such plans and specifications. Complainant himself evidently so construes the contract as he claimed more than half of the compensation for such services.

Nor could it be ascertained until the completion of the contract what would be the cost of the building on which the percentage for compensation is based.

One of the issues raised by the pleadings was that Rose Meyer had never ordered the work done by complainant nor authorized anyone to order it for her. There was no proof whatever that she had.

The conclusion we have reached obviates the necessity of considering any other points urged for reversal.

We are not concerned with any legal claim complainant may have for his services, but under the evidence he was entitled to no lien under the Mechanic's Lien Act.

The decree is reversed.

Reversed.

Gridley, P. J., and Scanlan, J., concur.

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32962

CHARLES BAGVILES,
Plaintiff in Error,
v.

THE WESTERN & SOUTHERN LIFE
INSURANCE CO., a corporation,
Defendant in Error.

ERROES TO MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The suit below was brought upon two policies of insurance issued by defendant to Barbara Bagviles, a sister-in-law of plaintiff, each insuring her life in the sum of \$424. Defendant's affidavit of merits pleaded that plaintiff had no right to maintain the action, alleging that the policies were payable to the estate of the deceased, and also that the insured was not in sound health on the date of delivery of the policies, as required to be by their terms.

The cause was heard without a jury. Plaintiff produced and the court read the two policies, and a document on one of defendant's forms, purporting to have been signed by the insured, authorizing defendant to pay the amount due on one of the policies to plaintiff. Though not formally introduced the policies were evidently treated as in evidence, and on reading them and said document, evidently treated as offered in evidence, the court held that only the administrator of the estate could maintain an action on the policies, and that this fact was not affected by the document authorizing payment to plaintiff. Plaintiff's counsel offered no proof of the execution of said document but manifestly relied on the

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THE U.S. AIR FORCE AND
NAVY, WASHINGTON, D.C. 20330-5000
OFFICE OF THE SECRETARY

... ..

7. The following is a list of the names of the persons who have been named in the above-mentioned affidavits as having been in the possession of the same at the time of the same being seized:

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U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, WASHINGTON, D.C. 20535

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Subsequent to the 1990s, the number of studies on the effects of the environment on the development of children has increased. The following table summarizes the findings of these studies.

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claim that plaintiff was equitably entitled to payment under the "facility of payment" provision in the policy, which reads:

"The Company may make any payment or grant any non-forfeiture provision provided for in this Policy to any relative by blood or connection by marriage of the Insured, or to any person appearing to the Company to be equitably entitled thereto by reason of having incurred expense or obligation on behalf of the Insured or for the Insured's burial; and the production by the Company of a receipt signed by any or either of said persons or other proof of such payment or grant of such provision to any or either of them shall be conclusive evidence that such payment or provision has been made or granted to the person or persons entitled thereto, and all claims under this Policy have been fully satisfied."

Plaintiff alleged in his statement of claim that he paid the undertaker and funeral bills. Regardless of what the record shows as to the fact under such provision it was merely optional with the company whether it should pay him or not. (McDaniels v. W. & S. Life Ins. Co., 332 Ill. 603.) Such has also been the rulings of this court. (Griffith v. Prudential Ins. Co., 172 Ill. App. 304; Bishop v. Prudential Ins. Co., 217 Id. 112; Heubner v. Metropolitan Life Ins. Co., 146 Id. 282.)

Nor did any right of action accrue to plaintiff by reason of the document authorizing payment to him, it expressly providing that it should not in any way vary or alter the terms and conditions of the facility of payment clause.

In an action on a like industrial insurance policy and like document of authority to receive payment on the policy it was held in the McDaniels case, supra, that the person authorized under such a document to receive payment was not the only person to whom the company could, under the contract, pay the fund, and as long as the company did not exercise its option or privilege under the facility

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1. The first of these is the fact that the system is not a simple one, but a complex one, involving many different factors and many different people.

CONFIDENTIAL - This document contains information which is exempt from public release under the Freedom of Information Act, 5 U.S.C. § 552.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

of payment clause, such person had no right to sue but that such right rests in the personal representative of the insured, where the policy, as here, did not name any beneficiary. That decision is decisive of all questions raised in this case.

The judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Seanlan, J., concur.

It is a very common mistake to suppose that the
 only way to get a good result is to do it
 the first time. In fact, the best way is to
 do it over and over again, until you are
 satisfied with the result.

Original - 100% - 100%

32998

MANUFACTURERS TERMINAL COMPANY,
a corporation,

Appellant,

v.

WAUKESHA FOUNDRY COMPANY,
a corporation,

Appellee.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The three appeals, general Nos. 32998, 32999 and 33000, consolidated for hearing, are from judgments in favor of defendant in suits brought by the lessor against the lessee to recover rent under a lease.

The suits were tried together without a jury and together they cover a claim for one year's rent from August 1, 1926, at the rate of \$273.33 a month, the first suit (No. 32998) for the first nine months, the second (No. 33000) for the tenth month, and the third (No. 32999) for the eleventh and twelfth months of said year.

Each suit is based upon the theory that defendant was a holdover tenant after July 31, 1926. It was defendant's theory that the term of the lease did not expire until September 14, 1926, when it vacated the premises.

In its original form the lease, dated May 20, 1921, fixes a term of five years from August 1, 1921, until July 31, 1926, and a rental of \$10,000 for the entire term. It requires the first year's rent (\$2,000) to be paid in advance, as was done, and the balance in monthly installments of \$166.66 each in advance of each and every month of said term.

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Attached to the lease as a part thereof is rider No. 1 which provides for certain work to be done by the lessor on the building of the leased premises. It was manifestly contemplated that the work would be done in time for the lessee's occupancy August 1, 1921, the beginning of the term.

The second rider, executed June 19, 1921, also attached to the lease as a part thereof, conveys additional space in said building and requires the lessor to make further improvements, for which it was to accept and did accept, a 90 day acceptance for \$1280, to be a receipt for rent from August 1, 1921, to July 31, 1922, thus making the monthly rent thereafter \$273.33 payable each month in advance.

The third rider, executed September 17, 1921, was also attached to the lease as a part thereof, and it is over the construction of this rider that the controversy arises. The material part reads as follows:

"RIDER NO. 3.

* * * * *

It is mutually understood and agreed by and between the parties hereto that on account of unavoidable delay in getting the building ready in specified time, as per lease, the lessor hereby agrees that the sum of \$3,230.00 is to be credited, or that the lessee is not to pay any further rental on the demised premises, as described in the lease, until September 15, 1922, at which time the lessee is to pay one-half month's rent, and thereafter rentals are due and payable on the first of each and every month in advance, as specified in the lease."

The lessor not having completed the improvements called for in said riders Nos. 1 and 2, a conference was had between the parties on July 26, 1921, with reference to that situation at which the lessor's contractor said he would require until September 15 to complete the repairs and improvements contemplated. An understanding

which, however, is not the case in the present case. The fact that the defendant has been found guilty of the same crime as the plaintiff, and that the defendant has been found guilty of the same crime as the plaintiff, is not sufficient to establish that the defendant is liable for the same crime as the plaintiff.

It is also not sufficient to establish that the defendant is liable for the same crime as the plaintiff, that the defendant has been found guilty of the same crime as the plaintiff, and that the defendant has been found guilty of the same crime as the plaintiff.

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was then reached for a modification of the lease, later to be put in writing, with reference to that situation. The premises became ready for occupancy September 17, 1921, when the instrument in question was executed, and the lessee took possession of the premises.

It will be observed that by the terms of the instrument, rider No. 3, no other rent was to be due or payable until September 15, 1922, when the lessee was to pay \$135.66 for the remaining half of that month, and thereafter a full month's rent in advance "as specified in the lease." The lease specified that all payments from that time were to be monthly in advance until July 31, 1926, the end of the term. There is no express language purporting to change the term of the lease and nothing, in our opinion, that implies any such intention. The rent having been paid already up to July 31, 1922, it merely provides in effect that the rent so advanced shall remain credited and that no further rent is to be paid until September 15, 1922, when the lessee was to pay one-half month's rent, and thereafter rentals "on the first of each and every month in advance, as specified in the lease," namely, from and after October 1, 1922, to July 31, 1926.

No question seems to have arisen with regard to the construction of the lease until the latter part of July, 1926, about the time of holding said conference when the arrangement was made resulting in the execution of said rider No. 3. But on July 30 or 31, 1926, the lessee was apprised of the lessor's claim that the lease expired on the 31st of that month; and it is admitted in the record that thereafter the lessor treated the lessee as a holdover tenant.

On the theory that rider No. 3 is ambiguous the court

received in evidence over plaintiff's objection the conversations had during the negotiations at which such arrangements were made, and the court overruled plaintiff's motion to strike such evidence. It was manifestly on such evidence the court's findings were based.

Upon the strength of such testimony appellee contends that the five-year term of the lease was not to begin until September 15, 1921, when the premises were to be ready for occupancy, and also whether such evidence was admissible or not the lease as modified by such rider requires the same construction. We cannot concur in either contention. We see no ambiguity or uncertainty of meaning in rider No. 3, hence oral evidence to interpret it was improperly admitted. Under a familiar principle all previous negotiations were merged in the subsequently executed instrument contemplated by the parties.

The question then is, in what respect did the rider modify the lease. Did it change its term, or merely provide for a relinquishment of rent for the length of time, one month and a half, defendant was deprived of the use of the premises by reason of the lessor's delay in making the repairs and improvements it agreed to make, which otherwise would have become payable in advance on August 1 and September 1, 1922?

Certainly the rider in question does not in express language make any change in the term of the lease or the amount of rent to be paid for the first year, namely, \$3,280, which had already been paid and was by the terms of both the rider and the lease to be credited as such. If it can be said that there is any uncertainty as to the meaning of the provision for crediting the \$3,280 it disappears in the alternative or explanatory clause following it, which, in our opinion, merely imports the intention

to relieve the lessee of paying any further rent until a year from the time the premises were ready for occupancy, viz., September 15, 1922, when it would be required to pay for the balance of that month only, and each month thereafter a full month's rent in advance "as specified in the lease." And defendant thereafter conformed to those requirements up to July 31, 1926. Had the parties intended to lengthen the term instead of relinquishing the rent for the month and a half defendant was deprived of the use of the premises even a layman might have employed more explicit language to express such an intention.

We think, therefore, the court erred in not striking the oral testimony received to explain the lease, and should have rendered judgment for the amount of rent claimed in each suit, with interest at 5 per cent per annum from the commencement thereof, together with reasonable attorneys' fees provided for in the lease. Hence the several judgments will be reversed and appropriate judgments entered here.

We do not think the claim for \$600 unreasonable for attorneys' fees for services connected with the first suit, but considering the amount involved in the last two suits and that the entire preparation necessary therefor was made in the first suit and they were tried together, we think a reasonable fee in the other two suits would be \$80 in each case.

The rent claimed and due in case No. 32998 is \$2,459.97, and judgment will be entered here in that case for that sum, together with interest at 5 per cent per annum from May 19, 1927, when the suit was begun, plus \$600, namely for \$3273.46.

In case No. 32999 the rent claimed and due is for the

months of June and July, 1927, namely, \$346.66, and judgment will be entered here for that sum, together with interest at the same rate from September 6, 1927, when the suit was begun, plus \$50 for attorneys' fees, namely for \$635.90.

In case No. 33000 the amount of rent claimed and due is \$273.33, for which sum judgment will be entered here, together with 5 per cent interest thereon from August 26, 1927, when the suit was begun, plus \$50 attorneys' fees, namely, \$343.27.

Judgment will be entered in the respective cases for such amounts respectively, with findings of fact that the lessee was a holdover tenant of the premises in question on and after August 1, 1926, and during the period for which rent is so awarded in each case, and that the lessee has failed to pay the same, and also a finding of the amount of attorneys' fees.

REVERSED WITH FINDINGS OF FACT AND
JUDGMENT HERE FOR \$3273.46.

Gridley, P. J., and Scanlan, J., concur.

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FINDINGS OF FACT.

We find that appellee was a holdover tenant of appellant under the terms of the lease and riders in question for the months of August, 1926, to April, 1927, inclusive, that it failed to pay the rent due for said months, amounting to \$2,459.97, and that the reasonable attorneys' fees provided for in said lease for services rendered in this action is \$600.

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MANUFACTURERS TERMINAL COMPANY,
a corporation,

Appellant,

v.

WAUKESHA FOUNDRY COMPANY,
a corporation,

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARBER DELIVERED THE OPINION OF THE COURT.

The appeal from the judgment below in this suit for rent for the months of June and July, 1927, was consolidated for hearing with the appeal in case No. 32998 in which we have this day filed an opinion. The two cases were considered upon like pleadings and testimony, and what we said in that opinion is applicable to this and is hereby referred to for our reasons for our judgment herein, namely, for \$635.90, which includes interest on the unpaid rent, and solicitors' fees for \$50 as therein stated.

REVERSED WITH FINDING OF FACT AND
JUDGMENT MADE FOR \$635.90.

Gridley, P. J., and Canlan, J., concur.

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1. *Journal of Management Studies*, 1997, 34, 1, 1-14.

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1. *Chlorophyll a* (Chl *a*)

Journal of Management Inquiry, Vol. 17 No. 4, December 2008 396-409
DOI: 10.1177/1056492608320000
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● 2010年10月1日起，凡在中华人民共和国境内销售货物或者提供加工、修理修配劳务以及进口货物的单位和个人，均应按照《中华人民共和国增值税暂行条例》及实施细则缴纳增值税。

32999

FINDINGS OF FACT.

We find that appellee was a holdover tenant of appellant under the lease in question, and that it held over for the months of June and July, 1927, and failed to pay the rent due for such months, namely, \$546.66, and that a reasonable attorneys' fee, as provided in the lease, for services in this action is \$50.

1. Introduction

The purpose of this study is to investigate the effect of the concentration of the solution on the rate of the reaction. The reaction is carried out in a closed system at constant temperature. The concentration of the solution is varied by changing the volume of the solution. The rate of the reaction is measured by the change in the volume of the gas evolved over a fixed period of time. The results are shown in the following table.

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MANUFACTURERS TERMINAL COMPANY,
a corporation,

Appellant,

v.

WAUKESHA FOUNDRY COMPANY,
a corporation,

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHIC. GO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The appeal from the judgment below in this suit for rent for May, 1927, was consolidated for hearing with the appeal in case No. 32998 in which we have this day filed an opinion. The two cases were considered upon like pleadings and testimony, and what we said in that opinion is applicable to this and is hereby referred to for our reasons for our judgment herein, namely, for \$343.27, which includes interest on the unpaid rent and solicitors' fees for \$50, as therein stated.

REVERSED WITH FINDINGS OF FACT AND
JUDGMENT SET ASIDE FOR \$343.27.

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4. *Journal of the American Medical Association*, 1991; 265: 1033-1036.

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FINDINGS OF FACT.

We find that appellee was a holdover tenant of appellant under the lease in question, and that it held over for the month of May, 1927, and failed to pay the rent due for such month, namely, \$273.33, and that a reasonable attorneys' fee, as provided in the lease, for services rendered in this action is \$50.

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AMERICAN BONDING AND CASUALTY
COMPANY et al.,
Complainants,

v.

CHICAGO BONDING & INSURANCE
COMPANY et al.,
Defendants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

IN RE: CLAIM OF ADOLPH J. SABATH,
Nos. 352, 471, 472,
Appellant.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal by Adolph J. Sabath, who became the owner of the claims herein involved which were filed with Leonard J. Brundage, receiver of the Chicago Bonding & Insurance Company, from a decree disallowing said claims and sustaining exceptions to and overruling the report of the master in chancery to whom the matter had been referred for proofs and his conclusions of law and fact. The master found that the claims should be allowed in favor of Adolph J. Sabath in the aggregate sum of \$101,054.17.

The material facts can hardly be said to be in controversy.

In 1917 the Chicago Bonding & Surety Company consolidated with the Prudential Insurance Company and adopted the name Chicago Bonding & Insurance Company. Before sanctioning the consolidation it was required by the Department of Trade and Commerce, in this State, that a certain amount of unsold stock

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of the Chicago Bonding & Insurance Company be taken up and paid for. Thereupon five directors of the company (including said Sabath) and two other parties (whose claims Sabath is now the owner of) subscribed for said stock and the same was issued in their respective names, endorsed by them in blank and put up by them as collateral to their respective notes given to the so-called "Morris Banks," for which said banks issued certificates of deposit aggregating \$100,000, which were turned over to said Chicago Bonding & Insurance Company in payment of such stock as contemplated by the requirement of said department, and its capital stock thus appeared on the books of the corporation as fully paid up. Said stock still remained in the names of said subscribers and as collateral to the loan or loans made on their said notes until 1919, when another consolidation was proposed between the Chicago Bonding & Insurance Company and the American Bonding and Casualty Company, an Iowa corporation. This new consolidation had to meet the requirements of the Insurance Departments of both states. Before it should be effected the Morris Banks required their loan to be taken up, pursuant to a promise made by the company's counsel. The method resorted to was by his giving a check of the Illinois corporation for the amount of the certificates of deposit, and the negotiation of new loans from two other banks by claimants giving their notes therefor and said stock as collateral thereto, for which said new banks issued certificates of deposit that were turned over to the Chicago Bonding & Insurance Company.

The device or method by which these loans were thus changed amounted, as testified to by the company's said counsel, to a mere transfer of the loans, and did not affect or change the

previous relationship between said company and said claimants as purchasers of the stock. The stock so issued to them was not cancelled, no new certificates of stock were issued, the loans by the new banks were made in their names and upon their notes secured by the stock which they had so subscribed for and which had been issued to them. The transaction, therefore, merely amounted to the substitution of one set of certificates of deposit for another to replace what went into and belonged in the treasury of the company as payment for the stock so issued, as was manifestly contemplated and done to meet the requirements of said state department before it would sanction the consolidation effected in 1917. In their very nature and form these transactions can bear no other construction than that there was an actual, bona fide sale of the unsold stock of the company for which it received from the purchasers the money they borrowed from the banks to pay for it.

But the basis on which the claims were presented, as appears from the evidence taken before the master, is that in the agreement for a new consolidation, dated December 31, 1919, the corporation agreed to repurchase said stock. The contention made here that the stock was purchased merely for the benefit of the corporation to be returned or paid for by it is not only inconsistent with the evidence aforesaid showing the purpose and an actual sale of the stock to said claimants, but it appearing that a repurchase of the stock by the corporation would have rendered it insolvent, it is clear that such an agreement would be unenforceable against the receiver or the rights of the company's creditors, policy holders and bond holders to the fund in the hands of the receiver, which it appears is not sufficient to pay their claims in full. They had

the right to rely on the good faith of such transaction, which as appeared on the books of the company showed the issuance of such stock and the receipt of payment therefor, and it is clear that such provision for repurchase of the stock in the said agreement of consolidation could not deprive them of their rights to resort to such assets which formed part of the company's capital stock and so part of the receiver's fund. The requirements of such agreement of consolidation could not affect the character of the transactions previously carried out pursuant to the requirements of the Insurance Department of this State calling for an actual sale of the stock. Not only will an agreement by a corporation to buy its own capital stock not be enforced to the injury of its creditors, but its capital stock is a trust fund for the payment of its corporate debts, on the application of which the creditors of the corporation have a right to rely for the payment of their claims. (Olmstead v. Vance & Jones Co., 196 Ill. 236, 241-242.)

On the books of the corporation the stock in question appears to be real, bona fide absolute stock, duly issued and paid for, and persons dealing with the corporation are entitled to rely upon such records. (Melvin et al. v. Lamar Ins. Co. et al., 29 Ill. 446.) If the purchasers of the stock deemed it a mere device by which they were to advance money for the benefit of the corporation then it is not only inconsistent with the purpose for which the State department required the stock to be sold and with the actual records of the corporation on which its stockholders and creditors had a right to rely, but it would be deemed a fraud in law against the corporation's ^{other} stockholders and creditors.

As to the right to enforce any of the claims in question against the receiver, we see no ground for distinction between them. In any view of the record we think it fully sustains the decree.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

33034

MAX L. RASOFF,
Appellant,

v.

YELLOW CAB COMPANY,
a corporation,
Appellee.

257 204
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of nil capias in an action predicated upon the settlement of a judgment obtained by plaintiff's client against defendant made after and in disregard of his alleged notice to defendant of plaintiff's lien thereon under the Attorney's Lien Act. (Cahill Stats. ch. 10, p. 13.)

The notice was left with a telephone operator in defendant's general offices.

It was held in Haj v. M. Bottle Co., 261 Ill. 362, that the service of notice required under said lien act must be actual personal service. In that case the service was by mail and held not to be in compliance with the statute. Since that time the Act has been amended to permit service by registered mail, but was not in force as amended when service was attempted in the case at bar. In Mayer et al. v. Yellow Cab Co., 247 Ill. App. 42, a like action to enforce an attorney's lien under said statute (also decided before said amendment) the service was made by leaving a copy of the notice with "a person over the age of 18 years, agent, then being on and in charge of the office of the said corporation." Following the reasoning in the Haj case, supra, and the authorities

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1. *Chlorophyll a* (Chl *a*)

18. *Journal of the American Medical Association*, 1990; 263: 1033-1037.

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there cited, the court held that such attempted service did not constitute service as required by said lien act, that it must be personal and in accord with sec. 8 of the Practice act providing for the service of process upon corporations. We adhere to that construction of the method of service required under the lien act as it was before modified by said amendment; and the amendment does not affect this case. Section 8 of the Practice act contemplates that before service may be made upon any other person provided for in said section it must appear that the president of the corporation could not be found in the county where the suit was brought. No such showing was made in this case. Without such proof this action could not be maintained.

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the research and the objectives of the study. It also mentions the scope of the study and the limitations of the study.

2. The second part of the report is a literature review. It discusses the previous research on the subject of the study. It mentions the findings of the previous research and the gaps in the research.

3. The third part of the report is a description of the research methodology. It discusses the research design, the data collection methods, and the data analysis methods.

4. The fourth part of the report is a presentation of the research findings. It discusses the results of the study and the conclusions drawn from the study.

5. The fifth part of the report is a discussion of the research findings. It discusses the implications of the research findings and the suggestions for further research.

6. The sixth part of the report is a conclusion. It summarizes the main findings of the study and the conclusions drawn from the study.

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33055

BENJAMIN COOKE,
Appellant,

v.

LOUIS SCHNEIDER et al.,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from the dismissal of an amended bill for want of equity, by which complainant elected to stand after a demurrer thereto was sustained.

The bill seeks to enjoin collection of a judgment and the granting of a new trial in a law suit brought by defendant Schneider against complainant and another to recover damages for an assault. The claim for relief is predicated wholly on alleged perjury by plaintiff in said law suit and two of his witnesses at the trial, and plaintiff's subornation of perjury.

While the bill is defective in several respects it is enough to say that it has been frequently held and is settled law in this State that a bill will not lie to set aside a judgment or decree merely on the ground that there was false testimony given at the trial on the issues of the case. (Yang v. Goodworth, 213 Ill. 404, 407; G. & S. N. R. R. Co. v. Innor, 116 id. 55, 63; Guthrie v. Loud, 33 Ill. App. 68; damsky v. Wiczorek, 93 id. 357, and the various authorities cited in said cases.)

To constitute fraud as a basis of equity jurisdiction the false evidence relied upon must be that which gives the court colorable jurisdiction over the defendant's person. (Caswell v.

Caswell, 120 Ill. 377, 384; Burton et al. v. Perry et al., 146 Id. 71, 102.) In the case at bar the alleged false evidence related merely to issues of fact in the case.

Appellant cites and relies upon Beward v. Cessa, 50 Ill. 228. While the general principles upon which the later decisions above referred to rest were not discussed in that case it was later distinguished in Brown v. Leuhns, 95 Ill. 195, in the fact that the only evidence on which the judgment in that case was recovered was false and admitted to be so by the witness who gave it - "that it was not a case of conflict of evidence." If in view of such later authorities the Beward case may now be deemed guiding authority, yet the bill in the case at bar does not disclose an analogous case. Nor aught set out therein to the contrary there were other witnesses than those who are alleged to have given perjured testimony, and appellant contested the same or else allowed himself to default and impliedly admit the cause of action.

The bill in effect seeks to impeach alleged false evidence relating entirely to the issues in a law case and thereby to set aside a final judgment therein. Under the authorities cited it cannot be done. The court properly sustained the demurrer.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

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32918

Gen. No. 32918

BENJAMIN BLUMENTHAL,
Plaintiff in Error,

v.

BARNEY BRAVERMAN,
Defendant in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE SCANTIAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, in a suit in assumpsit, Benjamin Blumenthal, plaintiff, sued Barney Braverman, defendant. There was a trial before the court with a jury and a verdict returned in favor of the defendant. Judgment was entered on the verdict and this writ of error followed.

This is the second trial of this case. The first trial resulted in a judgment for the defendant on a directed verdict at the close of the plaintiff's case. This judgment was reversed by this division of the court. (See Blumenthal v. Braverman, Gen. No. 32011, opinion filed January 31, 1923.)

In the instant case the pleadings of the plaintiff were the common counts and a bill of particulars which alleged that the suit was for money due the plaintiff for work done by the Mutual Construction Company on a building owned by the defendant and the plaintiff in tenancy in common; that the plaintiff paid the Construction Company, on February 13, 1921, the sum of \$711.20, and that there is therefore due from the defendant to the plaintiff one-half of that amount with interest. The defenses presented by the affidavit of merits were, first, that the judgment which plaintiff paid was the just obligation of the Erie Furniture

SECRET

MEMORANDUM FOR THE SECRETARY OF DEFENSE

DATE

SUBJECT: [Illegible]

1. [Illegible]

2. [Illegible]

3. [Illegible]

4. [Illegible]

5. [Illegible]

6. [Illegible]

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13. [Illegible]

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17. [Illegible]

18. [Illegible]

19. [Illegible]

20. [Illegible]

21. [Illegible]

Company, a corporation; second, that on or about January 23, 1919, the defendant was a stockholder of the Furniture Company, and that on or about that date he sold his interest and stock in said corporation to the plaintiff; that at said time the suit of the Construction Company against the Furniture Company was pending and the plaintiff had knowledge thereof; that on or about the last mentioned date the plaintiff and the defendant adjusted and settled all differences, accounts and liabilities between them existing by reason of any relationship between them to that date, and any and all other obligations or claims which might thereafter arise by reason of their aforesaid relationship; that the plaintiff then and there released the defendant from any liabilities then existing or which might thereafter accrue by reason of the defendant being a stockholder, director and officer of said Furniture Company, and then and there agreed to hold the said defendant free and harmless from any loss sustained by said company, or from any obligation which it had incurred, and especially agreed to hold the defendant free and harmless from any loss by reason of any judgment that might be recovered by the Construction Company against the Furniture Company; that there was then and there a complete settlement and discharge of each of the parties' respective liabilities regarding all and any business transactions between said parties prior to said time, or by reason of anything that existed or might arise or accrue from any transaction theretofore had between them; that it was specifically agreed that the defendant would not be liable for the claim of the Construction Company against the Furniture Company.

The plaintiff and defendant each owned one-half of the stock of the Erie Furniture Company, a corporation. They also owned

the premises at 1125 North LaSalle street, Chicago, as tenants in common. There was a building thereon and a barn or garage in the rear of the same, and it became necessary to have certain repair work done on the garage or barn. The Mutual Construction Company was hired to do the work and a written contract, dated June 5, 1917, was executed between that company and the Furniture Company. The Construction Company did the work and the amount of its bill was \$1106.65, and in 1919 it sued the Furniture Company for the balance then due, \$581.65, and in May, 1919, obtained a judgment against that company. In January, 1919, the defendant sold to the plaintiff his stock and interest in the Furniture Company. In February, 1921, the judgment of the Construction Company was paid by the plaintiff, and in the instant suit the plaintiff sues to recover one-half of the amount paid on the theory that where a tenant in common pays for necessary repairs on the property, or improves the property with the express or implied assent of his co-tenant, these all inure to the benefit of all the co-tenants, and the law requires each to contribute to the expense, in proportion to their several interests.

The plaintiff thus states his major contention: "The sufficiency of the proof by competent and credible evidence of the execution and delivery of this supposed lost release is the determining question on this review."

Robert Edelson, an attorney, formerly represented the defendant, but he had, at least nominally, withdrawn his appearance as an attorney for him. Edelson testified for the defendant as follows: That in January, 1919, he represented the defendant in connection with the sale of the latter's stock in the Furniture Company to the plaintiff; that at the conference held between the

attorneys for the respective parties and the plaintiff and the defendant, it was agreed between the parties that in case the deal went through the defendant must be released from any and all obligations of the Furniture Company; that the matter of the law suit of the Construction Company against the Furniture Company, then pending in the Municipal Court, was specifically mentioned and that the defendant insisted that he should be released from any obligation growing out of the same; that amongst a number of documents signed by the parties on that occasion was one in which the plaintiff and the Furniture Company released and discharged the defendant from any and all obligations of whatsoever kind and nature, and agreed that in the event that the Mutual Construction Company secured a judgment against the Erie Furniture Company the latter company would pay the judgment. Edelson testified that this document was signed by the plaintiff, the Erie Furniture Company and the defendant, and was witnessed by him and by Demick, the attorney for the plaintiff; that Demick is dead; that each of the parties to this case had a copy of the document; that he took the defendant's copy and placed it in his office files but that he is now unable to find the same although he has made a thorough search for it.

The plaintiff contends that the testimony of Edelson in respect to the execution of the supposed lost release is entitled to no weight, and that the judgment is therefore contrary to the manifest weight of the evidence. While this contention has been argued very strenuously, it is based upon the unwarranted assumption that the testimony of Edelson is the only proof as to the alleged release. Edelson's testimony is not only corroborated by the defendant but also by the plaintiff. The latter testified that at the time he purchased the defendant's stock he agreed to pay

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all unpaid bills against the Furniture Company; that he "assumed to pay, to pay everything due of the Erie Furniture Company;" that he signed two instruments, as an individual and as an officer of the Furniture Company, in which he assumed all of the obligations of the Furniture Company that existed at that time.

That the Furniture Company was legally liable to pay the claim of the Construction Company is, of course, conceded by the plaintiff. In the light of the testimony offered by the plaintiff and the defendant in the matter of the alleged release, the jury could reach no other reasonable conclusion than that the plaintiff released and discharged the defendant from any and all liability growing out of the claim of the Construction Company against the Furniture Company.

The plaintiff contends that the court erred in giving two certain instructions at the instance of the defendant. These instructions had no bearing on the question of the alleged release. The plaintiff concedes that the defendant is not liable to the plaintiff if the defendant has proven by competent evidence the alleged release, and, as we have heretofore stated, the jury, under the evidence, were obliged to find this issue in favor of the defendant. Therefore, if the instructions in question were subject to criticism it would avail the plaintiff nothing. However, when all of the instructions given are considered together, we think they fairly apprise the jury of the law applicable to the case.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

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1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the study. The next step is to collect data. This is done by the investigator who is responsible for the study. The next step is to analyze the data. This is done by the investigator who is responsible for the study. The next step is to interpret the data. This is done by the investigator who is responsible for the study. The next step is to report the results. This is done by the investigator who is responsible for the study.

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1. 在 1990 年 12 月 31 日，该企业的净资产为 100 万元。

32921

JESSE R. HUNTER,
Appellant,

v.

JENNIE M. HUNTER,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Jesse R. Hunter, appellant, filed his bill for divorce in the Superior court of Cook County against Jennie M. Hunter, appellee. After answer filed there was a hearing on the merits and on February 2, 1927, the court entered a decree ordering appellant to pay the appellee within three months the sum of \$150 as solicitor's fees and dismissing the bill for want of equity. On March 9, 1928, the appellee filed a petition praying that the appellant be ruled to show cause for his failure to pay said fees and on the same day the rule was entered. Sometime thereafter, upon a hearing of the rule, the chancellor entered the following order:

"On motion of Solicitor for Jennie M. Hunter, defendant, and it appearing to the court that a decree was heretofore entered requiring Jesse R. Hunter complainant to pay to the said Jennie M. Hunter the sum of \$150.00 solicitors fees and that a rule was issued against the said Jesse R. Hunter to appear and show cause if any he had why he should not be adjudged in contempt of court for failure to comply with said decree and that an order for an attachment was entered and that said sum of \$150.00 is now due and owing from the said Jesse R. Hunter to the said Jennie M. Hunter and that the said Jesse R. Hunter has neglected and refused to pay the said sum of \$150.00 and the court being duly advised in the premises and said Jesse R. Hunter being before the court;

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IT IS ORDERED that the said Jesse R. Hunter be committed to the jail of Cook County there to remain until he pay the said sum of \$150.00 into this court for the use of said Jennie M. Hunter, but not more than six months, or until released by due process of law and that a warrant for said commitment issue forthwith directed to the sheriff of said Cook County Illinois to execute."

Jesse R. Hunter, appellant, has appealed from this order. The evidence heard on the hearing was not preserved by a certificate of evidence.

The appellant has assigned several grounds for a reversal of the order. One is meritorious. The appellant contends that the order is fatally defective because it contains no finding that the appellant is financially able to pay the \$150 solicitor's fees and that his failure to do so ^{is} wilful. It has been frequently held in this state that an order finding the husband in contempt for failure to pay alimony or solicitor's fees must be based upon findings of fact that the husband's financial ability and circumstances were such that he was able to pay the amount ordered and that he wilfully failed and refused to obey the order of the court.

(Mueller v. Mueller, 202 Ill. App. 116, and cases cited therein; Dinet v. The People, 73 Ill. 183.) The last mentioned case is quoted with approval in Ill. Malleable Iron Co. v. Michalek, 279 Ill. 221, 231. The order in question was in favor of the appellee and in order to sustain it on appeal it was her duty to preserve the evidence by a certificate of evidence or to have the decree recite sufficient facts to justify the ultimate conclusion drawn. (Becklenberg v. Becklenberg, 232 Ill. 120; Huppe v. Glog, 243 Ill. 414.) An order in a proceeding like the one now under consideration is neither uncommon nor complicated. For a proper form,

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see Puterbaugh Fl. & Pr., Chancery, 6th Ed. p. 491.

The order of the Superior Court of Cook County, of June 22, 1928, committing the appellant to the jail of Cook County is reversed.

REVERSED.

Gridley, P. J., and Barnes, J., concur.

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32940

FRONA LEE,
Appellee,

v.

ABRAHAM HASSEN,
Appellant.

3-1-621⁴
APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Frona Lee, plaintiff, sued Abraham Hassen, defendant, in the Circuit Court of Cook County in an action in assumpsit. The case was tried before the court and a jury, and there was a verdict returned finding the issues in favor of the plaintiff and assessing her damages in the sum of \$1375. Judgment was entered on the verdict, and this appeal followed. Plaintiff sued to recover damages for an alleged breach of promise of marriage.

The evidence shows that the plaintiff had been married to one E. Hamilton Lee and that the latter filed a bill for divorce against the plaintiff in November, 1921, and that a decree of divorce was entered January 7, 1922. The plaintiff did not introduce a certified copy of the decree, and the defendant contends that "the entry of a decree of divorce can only be proved by the record thereof" and that therefore "plaintiff has failed to prove that portion of her declaration alleging that plaintiff was competent to enter into a contract of marriage with the defendant."

On direct examination the plaintiff testified, without objection, that she was divorced from Lee on January 5, 1922, and that the bill was filed November, 1921. On cross-examination,

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the following occurred:

"Q. Where did you live in January, 1922, at the time you had gotten your divorce?

A. 909 Sheridan Road.

Q. Then how soon after the divorce did you go out with Mr. Hassen?

A. It was before he went to Europe.

Q. How soon after you obtained your divorce did you go out with Mr. Hassen, when I ask how soon, Mrs. Lee, I mean how many days or months each time, in the extent of time?

A. Well, possibly three months after the divorce. I met him - - "

The plaintiff called as a witness her former husband and he was asked a question as to whether or not he had ever seen a ring that was shown him. Defendant's counsel then objected to the witness testifying, and the court ruled that he could only testify as to something that transpired after the divorce. Thereupon the following occurred:

"Mr. Landis (attorney for the defendant): Let's find out when the divorce was, 19 what - -

Mr. Porter (counsel for the plaintiff): 1922.

Mr. Landis: 1922.

The Court: January.

Mr. Porter: January, 1922.

Mr. Landis: Well, if he ever saw it after January, 1922."

The witness was then asked two questions in respect to the ring and the following is the entire cross-examination.

"Mr. Landis: One question: You were divorced in January of 1922 from this lady, is that true?

A. Correct.

Q. You filed a bill against her?

A. Yes.

Q. Is that right, is that true? A. Yes."

From the foregoing, it is apparent that both the plaintiff and the defendant tried the case on the theory that the plaintiff was divorced from her husband in January, 1922, and from the colloquy that occurred between the court and the counsel when the objection was made to the witness Lee testifying, it would appear

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that the counsel for the defendant conceded that the parties were divorced in January, 1922. There is no merit in the present contention and it is plainly an afterthought. If the defendant had desired to dispute the divorce he had the right to demand that it be proven by the record.

The defendant next contends that "no mutual promise of marriage was proven." We have carefully examined the evidence bearing upon this contention, and we are satisfied that there is no merit in it.

The defendant next contends that "it was incumbent upon plaintiff to make a showing of some kind of the ability of defendant to respond in damages" and that she failed in this regard. There is no merit in this contention. The gist of the action was the breach of the defendant's contract with the plaintiff, and the introduction of evidence of the pecuniary ability of the defendant was not necessary. No punitive damages were asked by the pleadings nor did any instruction refer to such damages. Moreover the defendant in his assignments of error has not questioned the amount of the verdict.

The defendant offered in evidence what purports to be a release in writing, by the terms of which the plaintiff released the defendant from any claims of the plaintiff which might or could be litigated in the instant suit, and the court sustained the objection to the offer on the ground that the release had not been specially pleaded. This ruling was correct. The plaintiff commenced the present suit on October 19, 1926, and filed her declaration on January 6, 1927. The defendant filed his plea to the declaration on January 24, 1927. There were no other pleadings

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filed in the case. The alleged release is dated June 11, 1927. The suit of the plaintiff was one in assumpsit and "it is undoubtedly the general rule of the common law that a matter of defense which arises after suit brought and before plea must be pleaded to the further maintenance of the action, and that a matter of defense which arises after suit brought and also after plea filed, and either before replication or after issue joined, must be pleaded purs darrein continuance." Mount v. Scholes, 120 Ill. 394; City of Chicago v. Babcock, 143 Ill. 358, 364; Papke v. Hammond Co., 192 Ill. 631, 643. These cases held that an action on the case is an exception to this rule, and the defendant attempts to argue that the present proceeding was an action on the case. There is no merit in this position. The defendant was summoned to answer unto the plaintiff in a plea of trespass on the case upon promises, and the declaration is clearly one in assumpsit.

The defendant also contends that even if the release were not admissible because it had not been specially pleaded, nevertheless it was made competent by the cross-examination of the defendant's witness Schneider. There is no merit in this contention. On cross-examination of Schneider, the plaintiff in an effort to show that the witness was friendly to the defendant brought out the fact that he accompanied the defendant and the latter's lawyer to the plaintiff's apartment in June, 1927. The witness on redirect examination was allowed to testify to all that transpired on that occasion, including the payment of \$300 to the plaintiff by the defendant and the signing by the plaintiff of the alleged release. Thereupon, defendant again offered in evidence the alleged release, his counsel stating at the time that he relied upon it as a release. The court did not err in again refusing to admit the document in

evidence.

We have above passed upon all the contentions raised by the defendant on this appeal.

The judgment of the Circuit court of Cook County is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

32949

ANNA MARIE BROWN,
Appellee,

v.

YELLOW CAB COMPANY,
a corporation,
Appellant.

251,4621
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, Anna Marie Brown, plaintiff, sued Yellow Cab Company, a corporation, defendant, in an action on the case to recover damages for personal injuries alleged to have been sustained in a collision between a taxicab belonging to the defendant, in which plaintiff was a passenger, and an automobile. A jury returned a verdict in favor of the plaintiff in which her damages were assessed at the sum of \$2,000. The trial court required a remittitur of \$500 and upon the same being entered rendered judgment for \$1,500. This appeal followed.

The suit was originally brought against the Yellow Cab Company and George Lamb, the owner of the automobile with which the yellow cab collided. Service was not obtained on Lamb, and the case was tried against the Cab Company only.

The defendant offered no evidence, but it contends that the court erred in refusing to direct a verdict for defendant at the close of the plaintiff's case, "because there was no evidence fairly tending to prove proximate cause." The defendant concedes that the plaintiff introduced evidence tending to prove that the speed of the taxicab at the time of and prior to the accident was thirty-two to thirty-five miles an hour and that its cab, as it

The first part of the paper is devoted to a discussion of the general principles of the theory of the structure of the atom. It is shown that the structure of the atom is determined by the laws of quantum mechanics, which are based on the principle of the conservation of energy and the principle of the conservation of momentum. The second part of the paper is devoted to a discussion of the experimental results obtained in the study of the structure of the atom. It is shown that the experimental results are in good agreement with the theoretical predictions of quantum mechanics.

The third part of the paper is devoted to a discussion of the application of the theory of the structure of the atom to the study of the properties of matter. It is shown that the theory of the structure of the atom can be used to calculate the properties of matter, such as the density, the specific heat, and the thermal conductivity. The fourth part of the paper is devoted to a discussion of the application of the theory of the structure of the atom to the study of the properties of the radiation field. It is shown that the theory of the structure of the atom can be used to calculate the properties of the radiation field, such as the intensity, the frequency, and the polarization.

The fifth part of the paper is devoted to a discussion of the application of the theory of the structure of the atom to the study of the properties of the electron. It is shown that the theory of the structure of the atom can be used to calculate the properties of the electron, such as the mass, the charge, and the spin. The sixth part of the paper is devoted to a discussion of the application of the theory of the structure of the atom to the study of the properties of the proton. It is shown that the theory of the structure of the atom can be used to calculate the properties of the proton, such as the mass, the charge, and the spin. The seventh part of the paper is devoted to a discussion of the application of the theory of the structure of the atom to the study of the properties of the neutron. It is shown that the theory of the structure of the atom can be used to calculate the properties of the neutron, such as the mass, the charge, and the spin.

proceeded southward, was being driven nearer to the east curb than to the west curb, but it contends that as none of the passengers in the taxicab saw the other car prior to the collision, they knew nothing as to the manner of its operation or as to what caused it to collide with the taxicab, and that "for aught that appears the accident would have happened regardless of the speed of the cab or its position on the street," and that therefore the plaintiff has failed to show that her injuries were due to the negligence of the defendant; that "no matter if the defendant was, in fact, negligent in any particular in the operation of its taxicab, it would not be liable to the plaintiff unless such negligence was the proximate cause of her injuries."

We find in the record evidence substantially as follows: The defendant owned and operated a "Yellow cab," or taxicab, which it operated for the carrying of passengers for hire. On January 30, 1927, about 11:45 p.m., the plaintiff, her mother, sister and a gentleman named Stanton boarded the cab in question at 68th street and South Park avenue, Chicago, and instructed the driver to take them to the home of Mrs. Brown and her daughters at 7719 Calumet avenue. The temperature was about zero and the street was frozen over. The cab proceeded southward, and from the time it started until the collision it was "nearer the east curb than the west curb," in other words, on the wrong side of the street - that is, on the left-hand side of the street. From the start of the trip until the collision the taxi was going at a speed of between thirty-two and thirty-five miles an hour. The taxi was "jumping" and the passengers "were kept bouncing back and forth in the cab all the time." It "was going to the east and the west." At one point, the passengers "got a bump" and were "thrown against each other."

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Then the plaintiff's mother spoke to the driver and asked him to "please go slow, that he would be paid for his time." The driver "mumbled something" in reply but he paid no attention to the request and there was no change in the speed of the car. When the taxi "got between 73rd and 74th, there was a collision," and when the taxi came to a stop its front wheel was over the curb on the west side of the street. At the same time there was an auto standing on the east side of the street with its front wheel over the east curb. No other vehicles were then near the place of the accident and the taxi had not passed any vehicle during the entire trip. The auto on the east side of the street was owned and driven by George Lamb. The defendant, as well as the plaintiff, in the trial of the case, proceeded upon the theory that the taxicab and the Lamb auto had collided. The passengers in the taxi were the only witnesses called as to the accident, and none saw the auto before the collision.

If there is in the record any evidence from which the jury could, without acting unreasonably in the eye of the law, find that all the material averments of the declaration have been proven, the case should go to the jury. (Libby, McNeill & Libby v. Cook, 222 Ill. 206.) A party may prove his case by direct and circumstantial evidence or by either. The mere fact that the passengers in the taxicab did not see the automobile before the collision is not fatal to the plaintiff's case. The defendant was a common carrier and owed a much higher duty than that of ordinary cars to the plaintiff, and the evidence tends to show gross negligence on the part of the driver of the taxi before and at the time of the collision. A speed of between thirty-two and thirty-five miles an hour over a frozen street when the taxi "was going to the east and the west," in other words, skidding, was highly excessive, and proceeding with such speed "nearer the east curb

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than the west curb," in view of the skidding amounted to gross negligence, and it is significant that the taxi collided with the first vehicle that it met during the entire trip. There is no evidence in the record tending to show that the driver of the Lamb automobile was negligent; but even if he were, that fact alone would not excuse the defendant, for if the plaintiff was injured by the combined negligence of both parties she would have a cause of action against either or both. (See Lotesta v. Baker, 246 Ill. pp. 425, 431, and cases cited therein.) The collision occurred between street intersections and as the evidence for the plaintiff shows that the defendant's taxi, before and at the time of the collision, was on the wrong side of the street, the jury would, of course, be reasonably justified in finding that the Lamb automobile was on the right side of the street at the time of the collision. The automobile, after the collision, was at the east curb. In our judgment it is idle to argue that from the facts and circumstances of this case the jury might not reasonably find that the negligence of the defendant was a proximate cause of the accident.

The defendant next contends that the damages awarded are excessive. After a careful examination of the evidence bearing upon this contention, we are satisfied that it is without merit.

The defendant next contends that the court erred in allowing the plaintiff to prove that the plaintiff's mother told the driver to go slow. The defendant cites no authority in support of its contention. We think that the evidence was competent as tending to corroborate the uncontradicted testimony offered on behalf of the plaintiff as to the speed of the taxi and the negligent manner in which it was driven. There is no force in the argument of the defendant that as Mrs. Brown, the mother, was not the plaintiff in the case, her request to the driver should not have

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been admitted. She was a passenger and had as much right as the plaintiff to warn the driver of the taxi in reference to the speed. Under the circumstances it was the natural and proper thing to do.

The defendant next contends that the court erred in not allowing a proper cross-examination of the witness Stanton. The witness Stanton had testified that the plaintiff seemed to be unconscious after the accident, and he testified further that "she was swinging her hands around in the air, trying to feel her head." After this last statement counsel for the defendant put the following question to the witness: "Q. Swinging her hands around through the air. Well, you know a person who is unconscious cannot swing their arms around through the air, don't you?" The court ruled that the question called upon the witness to give an expert opinion as to what a person who is unconscious can do. Thereupon the counsel for the defendant moved to strike out the statement of the witness that the plaintiff seemed to be unconscious after the accident. This motion was denied. The defendant contends that the ruling was erroneous. We agree with the court's ruling. The court did not prevent the counsel from asking the witness how the plaintiff appeared - what she was doing - how long she remained in this apparent condition - whether she talked, etc. The answer to these questions would have enabled the jury to properly make a deduction as to whether the plaintiff was or was not conscious at the time. A lay witness can, of course, testify that an injured person seemed to be unconscious, etc. (West Chicago St. R. R. Co. v. Cahill, 165 Ill. 496; North Chicago St. R. Co. v. Gillow, 166 Ill. 444; Hanley v. Chicago City Ry. Co., 180 Ill. App. 397.) In any event, the alleged error relates to the question of the injuries sustained by the plaintiff, and we have already held that the amount of the judgment is not excessive.

During the examination of Dr. Scott, a witness for the plaintiff, he testified that he found on examination of the plaintiff, exaggeration of the deep reflexes. The court, although no objection was made by the defendant to the answer, of its own motion struck the answer and made the following comment on the answer: "Strike it out. I can't see anything that justifies that evidence. Strike it out. Coming in here about a year and a half after the accident and you are going to have somebody test the reflexes; not in this Court you aren't going to do it." Counsel for the defendant took no part in this matter and made no objection to the answer or to the action of the court in striking it out, or to the statement of the court in connection with the same. The defendant now complains that the jury may have been influenced by the testimony of the doctor that was stricken out. There is no merit in the contention. The action of the court in striking out the answer was unwarranted and the statement made by the court in connection with the same was harmful to the plaintiff and helpful to the defendant.

The same doctor testified that X-ray pictures of certain parts of the plaintiff's body were taken in the doctor's presence and developed under his supervision. The doctor was asked the following question: "Q. Doctor, will you take that picture and read what, if any, pathology, it shows? Mr. Kehoe (counsel for the defendant): I object to its being read upon the ground that Dr. Barnes, who was on the witness stand, testified that following this accident he took X-ray films of the alleged injured parts and found them to be negative, and therefore there is no proper assumption - * * * The Court: Read it and see what it is. The Witness: A. This X-ray film shows a curve in the lumbar spine to

the right. It shows - The Court: Strike that out, strike it out. You are not going to do that in this court. Without evidence that this woman at no time ever had anything wrong, or curve in the spine, I won't do it. You can't do it in this court. I won't stand for it, and that is all there is to it. You can go on if you want to, but I will not do it." The defendant contends that in spite of the ruling of the court that the defendant was injured by the answer that was stricken. The specific objection made by the counsel for the defendant to the question was without merit, as the mere fact that Dr. Barnes may have testified that the X-ray films he took showed nothing, would not preclude the plaintiff from proving by another physician that X-ray films that he took showed certain conditions, and the action of the trial court in striking the answer, especially as no objection had been made to it by the defendant, was unwarranted, and the language of the court in making the ruling was prejudicial to the plaintiff.

While Dr. Scott was on the stand a colloquy occurred between the trial court and the counsel for the defendant in reference to an objection made by the counsel to a question. During the colloquy the court said, addressing counsel for the defendant: "The Court: Then, I suppose, if you have a couple of doctors and they can't find anything, then another doctor does find something a year afterwards, that last doctor cannot testify. That is a new proposition of law. But, I am learning every day. You may be right, but I would like to look at the book. Then, if a person is unfortunate enough, according to your view, to have a couple of quacks and they don't find anything wrong, then they go to a competent person and he does find something wrong, because he finds it a year afterwards, therefore he can't testify." The defendant now

complains that the statement of the court was harmful to the defendant. It is a sufficient answer to this contention to say that the experienced counsel for the defendant who tried the case, although he did not hesitate to lecture the court and to enter into numerous colloquies with him during the trial in the presence of the jury, made absolutely no objection to the statement in question. The present contention is clearly an afterthought.

The defendant next complains that the court erred in giving to the jury, at the instance of the plaintiff, instruction number three. The ground of the complaint is that the instruction assumed liability on the part of the defendant if the jury believe from a preponderance of the evidence that the defendant was guilty of the negligence charged in the declaration or some count thereof, without requiring the jury to find from the evidence that such negligence was the proximate cause of the accident. The instruction complained of was not a mandatory one and the jury, by instruction number five, which was a mandatory instruction, were properly instructed as to the doctrine of proximate cause. The jury were also told by an instruction to consider the instructions in the case as a series, and not to separate or pick out one instruction from the other. While the instruction complained of was incomplete, it was supplemented by instruction number five, which clearly stated the law, and therefore the giving of instruction number three did not constitute reversible error. (People v. Reimeni, 316 Ill. 591; Moore v. Aurora, Elgin & Chgo. Ry. Co., 246 Ill. 56, 61; VanCleeef v. City of Chicago, 240 Ill. 313; Lukeman v. C. C. C. & St. L. R. Co., 237 Ill. 104, 110; American Car Co. v. Hill, 226 Ill. 227; T. M. & N. Ry. Co. v. Haws, 194 Ill. 92, 93.)

If we are correct in our ruling that the plaintiff made

out a prima facie case, it would follow, as the defendant offered no evidence, that the only verdict that the jury could properly render would be one in favor of the plaintiff, and if, as we have held, the amount of damages allowed in the judgment is not excessive, a number of the above errors complained of by the defendant, even if they were meritorious, would not warrant a reversal of the case.

The defendant has had a fair trial and the judgment of the Superior Court of Cook County should be and it is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

32968

AETNA ACCEPTANCE COMPANY,
a corporation,
Appellee,

v.

CARL H. REESE,
Appellant.

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APPEAL FROM MUNICIPAL
COURT OF CHIC GO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, on April 24, 1928, Aetna Acceptance Company, a corporation, plaintiff, obtained against Carl H. Reese, defendant, a judgment by confession on a promissory note. On May 17, 1928, the defendant appeared and moved to vacate or open up the judgment and for leave to plead, and in support of the motion filed two affidavits, one made by the defendant and the other by one Albert Green. As the affidavit of Green relates to hearsay evidence only, it need not be considered. The court "denied the motion and refused to open or vacate the judgment, on the ground that the defendant had not shown due diligence." From the order overruling his motion the defendant appealed.

The defendant contends that "the court erred in refusing to vacate or open up the judgment as defendant's affidavit set up a meritorious defense and defendant was not guilty of laches." On September 30, 1927, the defendant secured a loan of \$2448 from the plaintiff, which was evidenced by a promissory note in a like amount executed by the defendant and made payable to the plaintiff. The note was secured by a chattel mortgage on an automobile owned

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by the defendant. The defendant made certain payments on account of the note, but on February 11, 1928, he was in default in the payment of certain installments and the plaintiff then took or was given possession of the automobile, and on the same day the plaintiff sent a notice by registered mail to the defendant informing him of a foreclosure of the chattel mortgage and that the sale of the automobile under the foreclosure would be held on February 16, 1928. The defendant did not attend the sale and he states that his conduct in that regard was due to the fact that one Gray, an employee of the plaintiff and the person with whom the defendant dealt in the matter of the note and chattel mortgage, stated to him that the car would sell for a sufficient amount to liquidate all of the indebtedness of the defendant to the plaintiff and that the defendant relied upon this statement of Gray. The plaintiff claimed that the automobile was sold at the sale for \$1,000 and that the defendant was credited upon his note with this amount. In the affidavit filed by the defendant it is stated that the said sale was a mere pretense and a fraud upon the defendant; that the pretended buyer was an employee or confederate of the plaintiff and represented the plaintiff in the transaction, and that after the pretended sale the plaintiff caused the said employee or confederate to sell the automobile in question to one Melvin Jacobs for a sum very greatly in excess of \$1,000, but the exact amount of which the defendant has not been able to ascertain; that the plaintiff "sold such car for a sum largely in excess thereof, to wit, \$2500.00, and that thereby the indebtedness of this affiant to such Aetna Acceptance Company was and is wholly and entirely liquidated and discharged." After a careful consideration of the affidavit of the

defendant we have reached the conclusion that it makes out a prima facie showing that the sale of the automobile under the chattel mortgage was not a bona fide one and that the alleged buyer at the sale, who subsequently sold the automobile to Jacobs, was but a "dummy" acting for the plaintiff in the premises. The affidavit of the defendant presented a legal defense to the action and he was therefore entitled to a trial on the merits unless the contention of the plaintiff that the defendant was guilty of laches in failing to present his motion to vacate at an earlier date must be sustained. In fact, the trial court denied the motion to vacate the judgment on the sole ground that the defendant had not shown due diligence in making the same.

The judgment in question was entered on April 24, 1928, but the defendant, in his affidavit, states that he did not have notice of the same until the service of the execution on April 28, 1928. On the hearing, the counsel for the plaintiff showed the court what purported to be a copy of a letter from him to the defendant, dated April 18, 1928. This copy was neither introduced in evidence nor marked as an exhibit in the case, but was nevertheless considered by the court, over the objection of the defendant, and it has been included in the bill of exceptions, over the objection of the defendant. The letter states: "You are hereby notified that I had a judgment by confession entered against you today on behalf of the Aetna Acceptance Company, for the sum of \$1454.00 and costs amounting to \$13.00, making a total of \$1467.00. * * * (Signed) William S. Kleinman." It will be noted that the letter does not state the court in which the judgment was taken and it will be further noted that the judgment in the instant case was not entered until April 24, 1928. The defendant states in his affidavit that

he moved to vacate the judgment nineteen days after he had notice of the entry of the judgment, and he further states that immediately after receiving notice of the judgment he "got in touch with counsel with relation thereto and that ever since the service of such execution he has actively and diligently been preparing his defense to plaintiff's action herein." In view of the nature of the defense set up in defendant's affidavit, it is apparent that it might reasonably take the time that intervened between the notice and the motion to investigate the circumstances surrounding the sale and to prepare a defense to the plaintiff's claim. The plaintiff has failed to call to our attention any case that is an authority for its contention that the defendant under the facts and circumstances of this case was guilty of laches and that he should therefore be deprived of the right to make a defense to the plaintiff's claim. The only case cited by the plaintiff in support of its contention is Turnberger v. Wright, 239 Ill. App. 490. In that case the judgment was entered on April 14, 1925, and the motion to open it and for leave to plead was not filed until May 19, 1925, at a subsequent term of the court. The defendant in that case, "so far as the record shows, may have had full knowledge of the fact on the day the judgment was procured," and, moreover, it appeared from the defendant's affidavit that he had full knowledge of the nature of his defense from the time he executed the note on which the judgment was secured. In the instant case the defendant at the time he received notice of the judgment did not know the circumstances relating to the fraudulent sale and it required time for him to ascertain the same. His motion to vacate had to be supported by an affidavit that set up facts that made out a prima facie defense to the claim of the plain-

tiff.

In our judgment, in the present case, the trial court erred in holding that the defendant was guilty of laches, and it is apparent from the record that the court in reaching this conclusion was influenced by mere statements of the counsel for the plaintiff and by letters that were not properly before the court. If the theory of fact of the defendant as set forth in his affidavit be true, the plaintiff has been guilty of a fraud on the defendant and the latter should be allowed to make his defense to the claim.

The order of the Municipal Court of Chicago of May 17, 1928, overruling the motion of the defendant that the judgment by confession in favor of the plaintiff and against the defendant in the sum of \$1429 be vacated and set aside, is hereby reversed and the cause is remanded with directions to the Municipal Court to allow the defendant to file his affidavit of merits to the plaintiff's claim, the judgment of April 24, 1928, to stand as security.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Barnes, J., concur.

32936

WILLIAM J. CROKE,
Appellant,

v.

AUGUST H. ARNOLD,
Appellee.

11/26/22
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, in a first class action, William J. Croke, plaintiff, sued August H. Arnold, defendant. At the close of the plaintiff's case the trial judge directed a verdict for the defendant and entered judgment thereon. This appeal followed.

The case was tried upon the plaintiff's second amended statement of claim, which reads as follows:

"Plaintiff alleges that at the special instance and request of the defendant, and upon the oral special promise and undertaking of the defendant, that if he, the plaintiff, would loan the sums of money set up in Plaintiff's Exhibit A attached hereto and made a part hereof, to A. H. Arnold & Bro., a corporation, he, the defendant, would reimburse and repay the plaintiff, if the corporation did not, and that in reliance of said promises and inducements, plaintiff loaned said sums to said corporation; that said corporation has not repaid to the plaintiff the full amount of said sums of money so loaned, of all of which the defendant had knowledge; that defendant repeatedly orally promised to repay plaintiff the sums of money so loaned; that on February 19, 1924, the defendant signed a memorandum in writing confirming and reiterating his oral promises theretofore made to repay the plaintiff the balance due him from said corporation for the sums so loaned, copy of which memorandum is attached hereto, made a part hereof and marked Exhibit B; that in pursuance of said oral and written promises and memorandum the defendant made several partial payments to plaintiff, but now, though often requested, refuses to pay the balance of said sum, or any part thereof, to the plaintiff."

Exhibit B reads as follows:

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"A. H. ARNOLD COMPANY
Peoria, Illinois
February 19, 1924.

Mr. Wm. Croke
Dear William:

I was very sorry that it was necessary for you and I to have conversation like we did today but I do in no way blame you as on the face of it, you certainly have not anything to be grateful for. I want to assure you that everything I have told you in the past was with the best intentions and the condition I am in today is not altogether my fault, in fact, very little of it is, however, that is my misfortune. I had hopes of putting through deals as I told you about but they did not materialize. As I told you, I am absolutely flat. Am starting up a new company in the Creamery Machinery and Supply line and with any kind of luck, should be able to make money at once. Now as I told you, all of the assets are being liquidated and the money will be equally divided among the creditors. The difference between what you get from this division and what we owe you, I will take care of. It may take me some time, but I will get your money. As I suggested to you, it will be possible for me to send you a certain amount each week for awhile anyway, and after I get going, I may be able to give you some large amounts so as to clean up as soon as possible. The above statement you can take absolutely serious as I mean it. There is no use talking very much at this time because it is up to me to go out and make some money and that is what I am going to do. I would advise the people you owe money to, the situation you are in, explaining to them that your company had to liquidate and I am sure they will take the right viewpoint. This is an unfortunate situation but it is all in a lifetime. You have enough money coming to keep you comfortably fixed providing you can get it as outlined, and if I were you I would take it easy for some time to come. It was impossible for me to raise very much money today and I am enclosing herewith all I can possibly give you. Will try and give you something substantial when I come back the latter part of the week.

Now, Bill, do not think too hard of me because I really did the very best I could. It will be my aim to take care of you just as quickly as possible.

With kindest regards, I am
Sincerely
(Signed) August"

Defendant's affidavit of merits (inter alia, raises the defense of the Statute of Frauds.

The material facts proven by the testimony of the plaintiff are substantially as follows: The plaintiff and the defendant

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The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1910. The names are listed in alphabetical order of their surnames. The names of the persons who have been elected to the office of Justice of the Peace for the year 1910 are: [illegible text]

The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1910. The names are listed in alphabetical order of their surnames. The names of the persons who have been elected to the office of Justice of the Peace for the year 1910 are: [illegible text]

were friends for twenty years. The plaintiff "went to work for the defendant in the creamery supplies business under the name of A. H. Arnold & Brother." The employment commenced August 27, 1919, and continued until February, 1924. It is admitted that A. H. Arnold & Brother was incorporated, but the plaintiff testified that the defendant represented to him that it was not incorporated and that he, the defendant, was the man behind the business. During the time of his employment the plaintiff loaned money to the defendant or to A. H. Arnold & Brother on five different occasions. Prior to August 11, 1920, the defendant spoke to the plaintiff a number of times about the latter getting the defendant some money, and the defendant told the plaintiff that he would pay him twenty per cent and possibly twice that much for money. The defendant said: "You know me for years, I am behind it, I will see that you get your money, and as to the interest, I can't say how much. * * Of course, I am behind everything, I am the man right here, I am behind everything and will see that you get yours." To these statements the plaintiff responded: "Well, under that inducement I believe I will let you have \$1,000." The plaintiff then made out his check for \$1,000, payable to "A. H. Arnold & Bro." and handed the same to the defendant. He then received from the defendant a note for \$1,000 signed "A. H. Arnold & Bro., Inc., per A. H. Arnold, Treas." "A few weeks after that, about October 30th, I guess, I had \$150, and he told me he was in great need of money. * * * He told me he will pay that himself; he says, 'If the company don't pay it, I will pay it;' he says, 'We will be incorporated some of these days, and I will be paid everything.' * * I gave him a check on the Mercantile Trust * * for \$150, October 30th," payable to "A. H. Arnold & Bro." The plaintiff further

testified that a couple of weeks prior to August 12, 1922, the following occurred: "Well, he told me, of course, that if I could get my sister to put in some money, he says 'I will pay it,' he would see that she got her money at any time she wanted it back. * * 'Try to get some of your friends in Chicago to put in some money, tell them all 10 per cent, that is all there is to it, I am behind the whole deal;' he says, 'You are getting the money for me and I am the one that will pay it back.'" The plaintiff's sister then loaned to him \$850, which he deposited in his bank to his credit and then made out his check for \$850, payable to "A. H. Arnold & Bro." At the time, the defendant said to the plaintiff: "You know me, I am behind this thing; any day your sister demands this money I will let her have it because we will be getting money from other places all the time." The trial judge refused to admit this check in evidence on the ground that it appeared to him that the \$850 loan was made by the sister and not by the plaintiff. Thereafter, the defendant was continually requesting the plaintiff to raise money for him and the plaintiff raised \$1,000 by selling some securities he owned, and on September 30, 1922, he handed to the defendant his check for \$1,000, payable to "A. H. Arnold & Bro." On this occasion the plaintiff told the defendant that he would have to have this amount back by the first of the year without fail because he had to pay a loan on his insurance policy, etc., to which the defendant responded: "I could have the money at any time I wanted it; * * he was behind all of it, he would pay it personally; remember who you are working for." The plaintiff owned ten shares of Standard Oil stock, worth \$665, and five shares of Swift & Company stock, worth \$537.50. In December, 1922, the defendant asked the plaintiff to loan him this stock and on

April 4, 1923, he stated to the plaintiff that he was very hard pressed for money, to which the plaintiff replied that he had nothing left but the said shares of stock. The plaintiff finally turned over this stock to the defendant upon the understanding that any time the plaintiff called for it the defendant would return the stock to him, "or the equivalent." What use the defendant made of those shares of stock the record does not disclose. A day or two prior to February 20, 1924, Arnold called on Croke at the latter's home. Croke at this time was practically destitute. The defendant explained to Croke that A. H. Arnold & Brother was in such a bad financial situation that it would have to liquidate, but that the plaintiff should not worry about anything; that he should file his claim with the trustee for the money that he had coming from A. H. Arnold & Brother and that he would get enough money right away from the trustee to keep him in comfortable circumstances until such time as the defendant could pay the balance due him; that he would send the plaintiff some money right along; "you will be given this money." The plaintiff further testified to the receipt of the letter of February 19, 1924, and to the fact that there was a check inclosed therein for \$10. He also testified to receiving from the defendant, on November 10, 1924, the following letter:

"Rhinelander, Wis.

My dear Sam:

I am enclosing herewith a check, am sorry it is not for more but every little helps. I will send you more as often as I can and will increase the amount whenever possible. Rest assured I will do my best. I was glad to see you the other Sunday and that you were looking well. I hope things are breaking better for you. Will see you again soon.

My kindest regards and best wishes

Sincerely

Inclosed in this letter was a check^{paid} for \$15. The defendant also paid the plaintiff \$10 on November 23, 1924.

The plaintiff contends (inter alia), first, "that the undertaking of the defendant was an original and not a collateral one; that his promise to pay the plaintiff was a direct and enforceable undertaking, not a collateral one, and the Statute of Frauds has no application;" second, "conceding, for the purpose of argument, that the oral promises made by Arnold were collateral, nevertheless, the letter of February 19, 1924, is a memorandum sufficient to take the case out of the operation of the statute."

We will first consider the second contention. In order to take a contract out of the Statute of Frauds, the memorandum must express with reasonable certainty, either by its own terms or by a reference to some other writing, the substance of the contract. The contract cannot rest partly in writing and partly in parol, and recourse cannot be had to parol evidence to supply the essential elements of the contract. (See Campbell Investment Co. v. Taylor, 246 Ill. App. 433, 440, and cases cited therein; Western Metals Co. v. Hartman Co., 303 Ill. 479.) Other cases to the same effect might be cited.

It is clear from a reading of the letter of February 19, 1924 (Exhibit B), that it does not undertake in any way to set forth the terms and conditions of any prior oral promise. In fact, there is no recognition in the letter of any prior oral promise to pay the debt of A. H. Arnold & Brother. The identity of the party whose debt is to be answered for is not disclosed and the amount of the debt answered for is not stated. After a careful consideration of the memorandum in question we are satisfied that it does not express with reasonable certainty, either by its own terms or by a reference to some other writing, the substance of the alleged oral

contract and it is apparent that it would be necessary to have recourse to parol evidence to supply essential elements of the alleged contract. In our judgment the letter of February 19, 1924, is not sufficient to take the contract out of the Statute of Frauds. In the letter of November 10, 1924, there is no recognition in any way of any promise.

The first contention of the plaintiff is a meritorious one. "Where goods, money or services are furnished to a third person, at the request and upon the credit of the promisor, the undertaking is clearly original, and in such case the Statute of Frauds does not apply." (Lusk v. Throop, 139 Ill. 127, 132, and cases cited therein. See also Early v. Cassens, 216 Ill. App. 581, 588; Granite City L. & C. Co. v. Board of Education, 203 Ill. App. 134, 138.) Whether a promise is direct or collateral depends upon the intention, the understanding, and the situation of the parties, and all the circumstances of the transaction. (Davis v. Patrick, 141 U. S. 479, 487; 27 C. J. 135; Bonner & Marshall Co. v. Hansell, 139 Ill. App. 474, 481.) "Whether an undertaking is original or collateral merely, is to be determined, not from the particular words used, but from all the circumstances attending the transaction." (Blank v. Dreher, 25 Ill. 293.) "Whether or not the promise is original or collateral, within the definitions already given, is a question to be determined by the jury from all the circumstances of the case, and under the instructions of the court." (Lusk v. Throop, supra, p. 133.) "When all the relevant facts and circumstances in evidence are considered in the light of the law bearing upon the subject, it seems clear to us that the plaintiff made out a prima facie showing that the undertaking of the defendant was an

original and not a collateral one, and one not affected by the Statute of Frauds and in our judgment, the trial judge erred in directing a verdict for the defendant at the close of the plaintiff's case,

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

THEY GO TO THE STORE AND BUY THE BREAD AND THE BUTTER

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33031

SOL SIMONS for the use of S. MORRIS,
Appellee.

vs.

LOUIS SLUTSKY,
Appellant.

251-AL-322
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SCANLON DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the municipal Court of Chicago for \$399 against Louis Slutsky, garnishee, and in favor of Sol Simons for use of S. Morris.

On August 19, 1926, Sol Simons executed his promissory judgment note for \$300 payable to S. Morris and due ninety days after date. On January 3, 1928, Morris obtained a judgment by confession for \$399 against Simons on the said note. At the time of the execution of the note Simons was conducting a business at 1104 Granville avenue, Chicago. On July 8, 1927, he sold the garnishee, Louis Slutsky, the business, etc., and the latter entered into possession of the premises and conducted a business therein for about seven months. It is conceded that no written notice of the sale, as provided for in the Bulk Sales Law, was received by the beneficial plaintiff, S. Morris. The present garnishee proceedings were commenced on June 26, 1928.

The defendant contends (inter alia) that conceding that the Bulk Sales Law was not complied with in the matter of the sale from Simons to the garnishee defendant, nevertheless the beneficial plaintiff failed to show the amount of the proceeds derived by the garnishee defendant from the sale of the property in question or the value of the goods and chattels at the time of the sale, and that therefore it was impossible for the trial court to fix the amount of the liability of the garnishee.

The beneficial plaintiff placed on the stand the garnishee, Louis Slutsky, who testified that he bought the

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business from Sol Simons on July 8, 1927, and that he received from Simons at the time of the transaction a "bill of sale." The "bill of sale" was identified by the witness and was introduced in evidence by the beneficial plaintiff. It conveys to the garnishee certain goods and chattels and in addition it contains the following: "This sale includes the good will of the business, also the telephone number now used by the seller and the seller hereby covenants and agrees that he will not solicit any business from his former customers, either directly or indirectly and not open any business of the same nature within one-half mile in any direction from the premises number 1104 Granville Avenue, Chicago." The consideration stated in the "bill of sale" is \$1,000.

The only other evidence offered by the beneficial plaintiff was that of himself to the effect that he did not receive any notice of the sale.

It seems clear to us that the contention of the garnishee defendant is a meritorious one. The beneficial plaintiff neither proved nor offered to prove the value of the goods sold to appellee or their value at the time that the garnishee sold them, and it was therefore impossible to determine from the evidence what was the amount of the liability of the garnishee. See Monski v. Smith, 224 Ill. App. 206, 209. See also the dissenting opinion of Mr. Justice Barnes in Larsen v. Ritter, 227 Ill. App. 300. Moreover the garnishee defendant tried to prove the value of the goods sold to him by Slutsky but the trial court sustained the objection of the beneficial plaintiff to the offered proof. The garnishee defendant, after he purchased the business, conducted it for about seven months and then "sold the place" and "the good will of the place" to one Berger for \$850, and the beneficial plaintiff, in a weak answer to the garnishee defendant's present contention, argues

this evidence was sufficient to justify the court in entering a judgment for \$399. There is no merit in this position.

After a careful consideration of the instant contention of the garnishee defendant we are satisfied that it is a meritorious one and the judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

33052

EDWARD K. HOWARD, administrator
of the estate of Edward P. Howard,
deceased,

Appellee,

v.

CITY OF CHICAGO, a Municipal
Corporation,

Appellant.

45, 22¹
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE EDWARDS DELIVERED THE OPINION OF THE COURT.

Edward K. Howard, administrator of the estate of Edward P. Howard, deceased, plaintiff, sued the City of Chicago, a municipal corporation, defendant, in the Superior Court of Cook County, in an action in case. There was a trial before the court with a jury, and a verdict returned finding the defendant guilty and assessing plaintiff's damages at \$3,000. Judgment was entered on the verdict, and this appeal followed.

The record seems to be unusually free from error. The sole contention of the defendant is that "the deceased's own acts which are shown, we believe, to constitute negligence, which alone caused the injury, or, was the proximate cause thereof."

There was a ditch or depression, about 2 feet in width, and from 2 to 5 inches in depth, that extended practically all the way across North LaSalle street, near Germania place. The Illinois Bell Telephone Company, by permit issued by the defendant, had made an excavation at the place in question, several weeks prior to the time of the accident. The work^{was} done under the supervision of an inspector for the defendant. The excavation, after the completion of the work, had been temporarily filled, but the filling had sunk down and caused the depression in the street.

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β .

2. In the second part of the paper we shall consider the case of the system of equations (1) for arbitrary values of the parameters α and β .

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The depression had existed for about two weeks before the accident, and the facts clearly show that the city inspectors knew of the condition. The accident occurred on January 6, 1927, about 8:45 a. m. as the deceased, on a motorcycle, was then proceeding to his place of employment. There were but two witnesses who testified to the circumstances surrounding the accident.

Lehan Sweeney, operating superintendent for Butler Brothers, was driving to his place of employment in an automobile. He was an experienced driver. He testifies that as he left Lincoln Park and passed southward into LaSalle street the deceased, on a motorcycle was ahead of him, about fifty feet, and going in the same direction; that he (Sweeney) drove southward about two blocks, the deceased being all the time about the same distance ahead of him; that the witness was driving the auto about 18 to 20 miles an hour, and that the motorcycle was going at about the same speed; that at about Germania place "there was an obstruction or depression in the street there. There was a diagonal ditch running across, seemed to cross the street in the way, about two feet wide. * * * It varied, two or three inches some places and four or five in other places. It had been filled in temporary but sunk down. * * * I remember that little cut in there because I got quite a jolt crossing over it. I was afraid of breaking a spring. I always had to slacken down there. * * * I noticed that about two weeks." The deceased "struck that ditch and it threw his steering apparatus out and he went over and struck the curb. * * * I saw him fifty feet ahead of me strike that ditch and go over. I knew that he had struck that ditch * * * in the center of the road. * * * There was a car ahead of him, a truck. * * * The motorcycle turned turtle and it rolled over twice. * * * Where he crossed, the ditch was two or three

inches deep. I passed it every morning, dodged it every morning, and slackened. * * * After the accident I pulled over to one side and ran over and lifted the motorcycle off of him, and he was facing up, his head was on the curb. He had a cut on his forehead and a big gash on the back of his head from striking the curb and I saw he was bleeding at the mouth."

Henry Hopewell testified that he was driving a Ford one-ton truck, with a cab on it, directly in front of the deceased; was driving between 10 and 15 miles an hour; when he came to Germania place he started to turn into an entrance leading from the street to a shop in the rear, and as he did so he looked backward through a window in the cab and saw a motorcycle coming that made a sharp turn; the witness then drove the truck a short distance, and when he looked again through the window he saw that the man on the motorcycle had fallen; "he was lying on the curb on the east side of the street." When the Ford was about ten feet north of the place where he started to turn the deceased was then about five or ten feet behind the truck. The deceased made a sort of a short turn, and shot across the street. "I could not honestly say whether the motorcycle had crossed over the depression in the street * * * it all happened so quick; all I saw was the swing of the motorcycle; I saw the man winging the motorcycle."

The defendant argues that the testimony makes out a case of negligence on the part of the deceased. We are satisfied, after an analysis of the evidence of the two aforesaid witnesses, that the jury were justified in finding that Sweeney was in the better position to see what occurred just before and at the time of the accident. Nor do we find that the testimony of Hopewell is entirely inconsistent with that of Sweeney. Hopewell was looking backward

through a small window in his car, and was at the same time turning the Ford into the entrance to the shop. He saw the motorcycle turn sharply, but he could not say whether it was at the ditch when it made the turn. Both witnesses were disinterested persons, and both were apparently trying to tell the truth.

The defendant contends that the evidence shows that the deceased was going at a high rate of speed at the time of the accident, but we find nothing in the evidence to warrant this contention. For about two blocks the motorcycle was proceeding about fifty feet in front of the automobile driven by Sweeney, who was going at the rate of from 18 to 20 miles an hour. In front of the deceased was the Ford, and Hopewell testifies that, as he was proceeding south on LaSalle street, and approaching Germania place, he was driving between 10 and 15 miles an hour. The deceased was merely going along with the traffic.

The defendant argues that the ditch could have been seen about twenty-five feet away, and that, therefore, the deceased should have seen it in time to avoid it. The Ford truck was directly in front of the deceased, and tended to hide the view of the ditch until it turned towards the entrance.

The defendant also contends that the deceased must have known of the ditch prior to the accident, but there is nothing in the evidence to show that the deceased was ever on LaSalle street before the day of the accident. It was admitted that the deceased died from the injuries he sustained in the accident.

After a very careful consideration of the only contention raised by the defendant, we are satisfied that it is without the slightest merit.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

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Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-eight, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In The
APPELLATE COURT OF ILLINOIS
Second District

May Term, A. D., 1928.

CHARLES WESTFALL,
Appellee.

V.

METROPOLITAN LIFE INSURANCE CO.,
Appellant.

Appeal from
Circuit Court,
Winnebago County.

OPINION by BOGGS, J.

An action was instituted by appellee against appellant in the circuit court of Winnebago county to recover for the alleged failure to issue an industrial insurance policy for \$267. on the life of appellee's son.

The declaration originally consisted of one special count in assumpsit, and the common counts. It was thereafter amended, charging the negligent failure to issue a policy within a reasonable time after application therefor had been delivered to appellant.

To the declaration as amended, appellant filed a demurrer, which was overruled. Thereupon appellant filed four pleas. First, a plea of tender of the amount received for premium. Second, a plea setting up a receipt which provided among other things; "If the holder of this receipt does not receive a policy of insurance or the return of the money herein receipted for, within three weeks, write, stating name of agent and particulars, to Metropolitan Life Insurance Company, 1 Madison ave., New York City," and alleging "that the holder of said receipt, plaintiff herein, did not receive a policy of insurance or the return of the money therein receipted

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for, within three weeks, and did not write, stating name of agent and particulars, to this defendant," etc. Third, "that the preliminary contract, as evidenced by said receipt herein, contemplated a form of insurance policy heretofore issued by said defendant to William Westfall on three different occasions prior hereto, as evidenced by industrial policies" giving numbers, etc., and setting forth "that before the defendant would become liable to pay any loss thereunder, there should be made proof of death of said William Westfall, and that the plaintiff failed and neglected to make proof," etc. Fourth, "that the plaintiff herein did not have an insurable interest in the life of said William Westfall."

A trial was had, resulting in a verdict and judgment in favor of appellee for \$267. To reverse said judgment, this appeal is prosecuted.

It is first contended by appellant that the court erred in overruling the demurrer to said amended declaration. Appellant having pleaded over is not in a position to raise this question.

It is next insisted that the declaration is not sufficient after verdict. After verdict the pleadings upon which a judgment is based are liberally construed, for the purpose of sustaining the same. Chicago & A. Ry. Co. v. Clawsen, 173 Ill. 100; Klawiter v. Jones, 219 Ill. 629; Sargent Co. v. Baublis, 215 Ill. 428; Diamond Glue Co. v. Wietzychowski, 227 Ill. 338; Plew v. Boor, 274 Ill. 232-234.

It is specifically insisted that, inasmuch as the declaration failed to aver that the insured was of sound health at the time the application was issued, this being a necessary averment, the judgment cannot be sustained. One of the pleas, filed by appellant alleges that the insured was not of sound health at said time. Both appellee and appellant is therefore not in a position to urge this point. It was made an issue by said plea and in the giving of instruction. Wallace v. Curtis, 36 Ill.

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156-158; Rubens v. Hill, 213 Ill. 522-537.

It is also contended by counsel for appellant that the verdict and judgment cannot stand, for the reason that appellee had no insurable interest in the life of the deceased. This point is not well taken, for the form of the policy to be issued by appellant contemplated that payment of the amount insured for might be made "to the Insured, husband or wife, or any relative by blood or connection by marriage of the Insured," etc.

It is next insisted that there is no sufficient proof that four weekly payments were paid in advance at the time said application was made. The oral testimony on the part of appellee was to the effect that four such payments were made. The documentary evidence and the testimony on the part of appellant is to the effect that only thirty cents was paid at the time said application was made, and that the other payments were made some week or more thereafter. The evidence being conflicting, we would not be inclined to disturb the verdict on that issue.

The primary question for us to determine is as to whether a right of recovery is shown by the record. Appellee must recover, if at all, on the averments of his declaration, which is based on the negligent failure of appellant to issue a policy within a reasonable time. The receipt issued at the time said application was made is as follows:

"Received from William Westfall 30/100 Dollars, being a deposit of two weekly premiums on account of application for Insurance in the Metropolitan Life Insurance Co., made this date. If the application is accepted and a Policy issued, this sum will be applied toward payment of the premiums thereon. If application is rejected, the amount will be returned to the applicant. No obligation is incurred by said Company, by reason of this deposit, unless and until a Policy is issued upon said application, and ~~unless and until a Policy is issued upon said application, and~~ unless at the date and delivery of said Policy the Life proposed is alive and in sound health, EXCEPT that if the life proposed

is now in sound health and the amount paid by applicant at the time the application is written is not less than four weekly premiums, and this receipt, detached from the original application, covering such payment, is surrendered to the Company, the Company agrees, if the Application is approved at the Home Office in New York, that should death occur prior to the delivery of the Policy it will, nevertheless, pay such amount as would have been due under the Policy, if issued. No obligation is assumed by the Company unless the application is so approved and the Life proposed is now in sound health.

"Dated 11/19 1926. District.....Richardson, Agent."

"(Return this receipt if you get a policy, and see that the agent gives you proper credit).

"SEE NOTICE ON OTHER SIDE."

On the back of said receipt, it is stated:

"BE CAREFUL OF THIS RECEIPT, IT IS VALUABLE.

"If the holder of this receipt does not receive a Policy of Insurance or the return of the money herein receipted for, within three weeks, write, stating name of Agent, and particulars, to

METROPOLITAN LIFE INSURANCE CO.,

1 Madison Avenue, New York City."

Said receipt constituted a contract by which appellant was to pay the beneficiary \$267.00 upon proof that four weeks' premiums were paid at the time the application was made; that said application had been accepted and that the insured was in good health at the date of the application, and this even though the insured's death should ensue prior to the delivery of a policy. For a breach of said contract a right of action would accrue. Taking this contract in connection with the notice on the back thereof, an action for negligence in failing to issue a policy in a shorter time than three weeks, would not lie. See Bradley v. Federal Life Ins. Co., 295 Ill. 381.

Counsel for appellee cited several cases from other states, holding that an action could be maintained for the negligent

failure to issue a policy within a reasonable time. Those cases would not be applicable here in view of the provisions of said receipt and the notice contained thereon.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

relative to these a policy of "no comment" would now be applicable as in view of the receipt and the notice contained in the For the reasons stated and the trial court will be required to find as requested.

Very truly yours,

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

251 I.A. 623²

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

October Term, A.D. 1928.

Appeal from
Circuit Court
of Mercer
County.

OPINION by BOGGS, J.

"In order to give the said mortgagors, John W. Zwicker and Lillie E. Zwicker the right to redeem the said Real Estate; the Mortgagees hereby covenant and agree with the said John W. Zwicker and Lillie E. Zwicker, that the said John W. Zwicker and Lillie E. Zwicker shall have until the First day of October, 1925, to make full payment unto the Farmers State Bank of Preemption for

General No. 756

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the principal sum of Twenty-five Thousand Six Hundred-eighty (\$25,680.00) dollars plus interest at the rate of 7% from the First day of March, 1925. Upon the payment of the above amount the Farmers State Bank of Preemption agrees to give to the said John W. Zwicker and Lillie E. Zwicker a clear and merchantable deed of title to the real estate before mentioned.

"The Farmers State Bank of Preemption, by Its President, Henry McCaw and its Cashier, Chester G. Samuelson further agree that they with the co-operation of the other members of the Board of Directors of the Farmers State Bank of Preemption will do all that they can to further the sale of the above mentioned real estate so that it may be sold for as much of a sum above the indebtedness of Twenty-five Thousand Six Hundred Eighty Dollars as is possible to obtain. They further agree that they will in no way hinder or obstruct the sale of said land unless it be for a sum of less than the amount heretofore mentioned plus accrued interest.

"The parties of both parts hereby agree that time is the essence of this agreement and that on the First day of October in the Year One Thousand Nine Hundred Twenty-five that this contract shall be null and void and the said Farmers State Bank of Preemption shall be released from all obligation on their part."

On the same day, appellee and appellant John W. Zwicker entered into a further agreement which, after reciting the foregoing contract, states: "The said party of the first part (appellee) to do all in their power to find a buyer for the said real estate at a consideration of Thirty-five Thousand (\$35,000.00) dollars, but, if unable to get that price, the party of the second part agrees that it may be sold at any figure better than Thirty Thousand (\$30,000.00) dollars.

"It further agreed between party of the first part that they will make no charge for their service, unless they are forced to make special trips or lay out money to cover actual expenses, other than commissions, of which there shall be none; in which case the party of the second part agrees to reimburse them for the

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amount so expended."

Some time prior to September 23, 1925, no sale having been effected, it was agreed between the president of appellee bank and appellant John W. Zwicker that he, Zwicker, should cause said property to be advertised for public sale on September 23, 1925, upon the following terms: "Ten per cent cash, day of sale, and balance on or before March 1st, 1926, when possession will be given. Abstract furnished and merchantable title conveyed by warranty deed."

It was further agreed that an auctioneer be obtained to cry said sale. At said sale, a bid of \$227.50 per acre was made, whereupon John McManus, on behalf of appellee bid \$228.00 per acre for said land, and said premises were declared sold on said bid.

After the execution of said quit claim deed and agreements, appellee bank received cash rent of \$376.00; for hay sold, \$160.95; and for rent corn, \$942.86. A disagreement having arisen with reference to said rents, etc., appellants filed in the circuit court of Mercer County a bill for specific performance and accounting.

Said bill after reciting said mortgage indebtedness; the execution of said quit claim deed and agreements, the sale of said premises, the collection of rents, etc., alleges that on September 23, 1925, said premises were sold to John McManus on behalf of appellee for \$27,360.00; that appellants had offered to make deed of conveyance to bank and comply with the same on their part; that appellee claims and pretends that it is the owner in fee simple absolute of said premises, without duty or liability to account for the rents, issues and profits or any part thereof; prays that an account may be taken and appellee decreed to pay to appellants the amount found due on such accounting and offers to perform said agreement of sale on their part.

A demurrer to said bill having been overruled, an answer was filed by appellee, admitting said mortgage indebtedness, etc.,

and alleging that "Being in arrears, defendants proposed to bank to convey mortgaged premises to defendant bank if bank would release mortgagors and return notes and agree that complainants would have the right to repurchase premises on or before October 1, 1925, for \$25,680.00, plus interest at 7% from March 1, 1925, and that defendant bank agreed to this proposition and complainants conveyed said premises as charged in bill; that defendant bank thereupon released mortgages and returned notes, and entered into the ^{to}written agreement set out in the bill; admits the collection of said rents, etc.; admits consenting to the sale of said premises, etc., and that said real estate was struck off and sold to appellee.

Charges that no note, memorandum or writing evidencing sale, was signed by McManus, or any officers of appellee, or any person lawfully authorized in writing by them. Denies that appellants are entitled to an accounting, etc.,

A replication was filed to said answer, and said cause was referred to the master to take the evidence and to report the same, together with his conclusions of law and fact thereon. Said evidence was taken and reported by the master, together with his conclusions.

The master found that the deed given to appellee was to secure it for the prior mortgages which had been extended, and was not intended as an absolute conveyance.

That various items of repairs were added to buildings on real estate by Zwicker from February 28, 1925, to September 23, 1925, and that said repairs increased value of real estate and should not be charged to bank; that appellee bank paid taxes on real estate for year 1925, amounting to \$166.84; that said taxes were paid on May 21, 1925, and that interest at five per cent should be computed upon said taxes from May 21, 1925, to September 23, 1925; that amount of said interest is \$3.53; that bank also paid taxes for year 1926 on April 9, 1926, amounting to \$212.08.

and stated the account between said parties as follows:

Appellee was charged with:

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| For bid on land | \$27,360.00 |
| For hay sold | 160.95 |
| For cash rent | 276.00 |
| | <hr/> |
| Total | \$27,396.95 |

It was credited with:

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| Principal and interest to March 1, 1925, | \$25,680.00 |
| Interest on \$25,680. at 7% from March 1, 1925 to September 23, 1925 | 1.008.66 |
| Interest at 7% on 9/10th of purchase price from September 23, 1925, to March 1, 1926 | 756.52 |
| Taxes for year 1925 | 166.84 |
| Interest on above taxes from date of payment | 3.53 |
| Taxes for 1926 | 212.08 |
| | <hr/> |
| Total | \$27,327.63 |

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|--|----------|
| Leaving balance due from appellee to appellants of | \$ 69.32 |
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Exceptions were filed to said report by appellee and by appellants, it being contended by appellants that they were entitled to said grain rent of \$942.86, as well as said cash rent and proceeds of hay. Appellee bank insisted that the conveyance to it was absolute, and wiped out appellants' indebtedness, and that said contemporaneous agreements merely provided for the repurchase of said premises by appellants on or before October 1, 1925. On the other hand, appellants insist said transaction amounted to a mortgage, and the master so found.

That finding is clearly supported, not only by said deed and agreements but by the oral testimony.

Henry McCaw, president of appellee bank, testified:

"At time deed was signed I talked to Zwicker about repairs on the house. Roof was bad, it was raining in and tenant

and stated the account between said parties was settled and the balance was paid.

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Expenditures were made for the purchase of goods and services, and for the payment of taxes, and for the payment of interest on the loan. The total amount of expenditures was \$1,000.00. The total amount of income was \$1,000.00. The net result was a balance of \$0.00. The account was closed on the 31st day of December, 1925.

told me about it when I was down there. Zwicker said he knew roof was bad and that it would have to be taken care of, those were practically the words he said, the plaster was coming off. He agreed he would look after it, have it shingled. I said it would only be a detriment and will be only an expense on you if you don't tend to it; that the plaster would come off, and he said he would take care of it."

This witness further testified:

"He (appellant) thought he ought to have control of the place, and I told him that I thought the Farmers Bank had more in the place than he had, and I didn't see why he ought to have control of it."

Chester C. Samuelson, cashier of said bank, testified;

"Zwicker said he thought he should have \$376.00 note (which was given for cash rent), and we said the note really belonged to us, unless he redeemed the place by October 1, and I told him that I would give him a receipt for \$376.00 as being left at the bank for collection, and if he redeemed the place by October 1, we would deliver the note to him, and if he didn't do that, the note belonged to the bank, and then I gave him the receipt."

Without quoting further from said evidence, the oral testimony as well as the documentary evidence clearly discloses that appellee bank, as well as appellants, were treating said transaction as a mortgage.

"Parties cannot make a conveyance of land absolute in form as security for the payment of money by a given day, and provide that if payment is not then made, deed shall be an absolute conveyance. If an instrument is a mortgage of lands, it remains a mortgage until the right of redemption is barred by some of the modes acknowledged by the law, and the right of redemption cannot be cut off by an agreement of the parties."

Halbert v. Turner, 233 Ill. 531-535, citing Bearss v. Ford, 108 Ill. 16.

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"Where there is a conveyance by deed, and a defeasance in a collateral paper, or a contract for a resale, and the evidence leaves it in doubt whether the transaction was intended as a conditional sale or a mortgage, it will, as a general rule, be treated as a mortgage." Keithley v. Wood, 151 Ill. 566-573.

"If it shall appear, no matter what the form of the transaction, that the conveyance is in fact an indemnity or security, it will be held to be a mortgage, and the character of the liability against which indemnity is intended, or the kind or dignity of the indebtedness to be secured, is unimportant."

Workman v. Greening, 115 Ill. 477; Helm v. Boyd, 124 Ill. 38 370.

The word "redeem" implies the existence of a debt, and negatives the idea of an absolute sale. Workman v. Greening, supra, 483.

Counsel for appellee insist that, because the note for \$20,000 and the note for \$4,000, above referred to, were cancelled and returned and the mortgages securing the same were released, that that was conclusive evidence to the effect that said transaction amounted to an absolute conveyance, with the right to repurchase. No provision was made in the contracts executed at the time said deed was made, providing for the cancellation of said notes ~~were not~~ and the release of said mortgages, and the evidence discloses that said notes were not cancelled and said mortgages were not released until the 25th day of March, 1925, some four weeks after said deed and agreements were made. This point therefore, is not well taken.

Some contention was made by appellee that the court erred in charging ti with said cash rent and the proceeds of said hay. The court did not err therein, and, even if it had, appellee is not in a position to question the same, for the reason that it assigned no cross errors.

It is insisted by appellants that the court erred in decreeing appellee entitled to said grain rent of \$242.86.

The terms of sale on which the property in question should be sold, were agreed on between appellants and appellee before said sale was advertised. Those terms provided that the possession of said premises should be delivered on March 1, 1926, therefor it would follow said rent should go to appellants.

The crop in question was raised by a tenant. The possession of the entire crop was in the tenant until such time as he had matured said crop and had turned over to the landlord his share thereof according to the terms of renting. Dixon v. Nichols, 39 Ill. 372-376; Sargent v. Courier, 66 Ill. 245; Alwood v. Ruckman, 21 Ill. 200; Grotefendt v. Schlaepfli-Siever, 213 App. 436; Life Ins. Co. v. Watson, 200 App. 315; Wilson v. Egan, 251 Ill. 452; Kays v. Blinn, 234 Ill. 121.

Where rent is reserved, payable in a part of the crop to be raised on the land, the tenant remains the exclusive owner of the crop until the stipulated rent is set off to the landlord. Dixon v. Nichols, *supra*, 372.

Mortgagee in possession is liable for rents and profits actually received, or which, by diligence, might have been received, to be credited upon the indebtedness from year to year, first, for the extinguishment of the interest, and then to extinguish the principal. Albert v. Turner, 233 Ill. 531; Strang v. Allen, 44 Ill. 428.

"The sale and purchase of the land was not complete until final payment had been made, and until the time when possession was to be given." Vaughan v. Cowles, 155 App. 670-680.

In Arzo v. Oberschlake, 48 App. 289, the court at page 293, in discussing the right to possession, etc., says:

"We think the appellants knew when they bid at the master's sale that they were bidding for a right to the title to the land and possession thereof on the 1st of February, and that they knew and well understood that matured, accruing rents, then partially severed from the land, would be wholly severed and removed before their right could or should attach."

In this case, appellee bank knew the terms of sale and when possession was to be given, and made its bid accordingly. It was not entitled to a deed or to possession until March 1, 1926. The mere fact that the record title was already in appellee would make no difference, for we have held that said deed, with the accompanying agreements, amounted only to a mortgage.

It is insisted by appellee that if the transaction of February 28, 1925, amounted to the giving of a mortgage it still remains a mortgage. The sale of said premises amounted to a sale of appellant's equity of redemption, and as the same was sold to appellee, it had the effect of extinguishing said mortgage indebtedness. While appellants could not, at the time of making said mortgage, contract away their equity of redemption, yet, after the mortgage was made, they might sell the same to a third party, or to the mortgagee.

If, for the sake of argument, it should be conceded that said mortgage was in existence at the time said decree was entered, appellants would be entitled to the rents accruing on said premises as owners of the equity of redemption.

The master credited appellee bank with interest on nine-tenths of the purchase price from September 23, 1925, to March 1, 1926, when the deed under said sale was to be executed and the possession delivered; and also allowed appellee the grain rent for 1925, which shows the inconsistency of said findings.

Appellee also insists that appellants are not in a position to have the terms of said sale carried into effect, for the reason that no memorandum in writing was made thereof at the time. Appellee bank had knowledge of the terms of sale and acquiesced therein before said sale was advertised. The evidence also discloses that the auctioneer read the terms of sale to the bidders at the time of sale. Appelleebank sets forth, in its answer, among other things: Admits that appellants "asked consent of defendant bank to have premises sold at auction on September 23, 1925, to which

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bank consented"; that "John McManus, a director of defendant bank and acting in its behalf, did bid therefor the sum of \$27,360.00, and that said real estate was struck off and sold to him."

Appellee is therefore not in a position to raise the question that there was no memorandum in writing, evidencing said sale.

The chancellor erred in not charging appellee with said grain rent of \$342.86. The decree is therefore reversed and the cause remanded, with direction to enter a decree in favor of appellants and against appellee for \$1,112.18, with interest thereon at the rate of 5% per annum from the date of the filing of the decree appealed from.

Reversed and remanded with directions.

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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

251 I.A. 623³

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

In The
APPELLATE COURT OF ILLINOIS,
Second District

October Term, A.D., 1928.

| | | |
|----------------------------|---|------------------|
| FRANK E. GIBBONS, |) | |
| Appellant, |) | |
| vs. |) | Appeal from |
| J. D. STRUTZEL and Frank |) | Circuit Court |
| Strutzel, Copartners Doing |) | of |
| Business as J. D. STRUTZEL |) | Winnebago County |
| AUTO COMPANY, |) | |
| Appellees. |) | |

OPINION by BOGGS, J.

An action was instituted by appellant against appellees in the circuit court of Winnebago county to recover a balance alleged to be owing on commissions earned as sub-agent for appellees, and for damages for breach of agency contract.

The declaration consists of one special count and the common counts. The special count charges that appellant was working under a contract entered into with appellees on July 29, 1925, constituting appellant a sub-agent for the sale of automobiles, which said contract contained this provision: "This contract shall be in force and effect up to and including the 31st day of December, 1925, with privilege of the party of the second part to renew the same for one year from that date at his option." Said count charges in effect that appellees, without any ground therefor, failed and refused to extend or renew said contract, appellant having notified them as provided therein of his election to so have the same extended, and alleges damages for the breach thereof, and also alleges that there was due to appellant cer-

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tain commissions on sales made by him prior to December 31, 1925.

To said declaration, appellees filed a plea of the general issue, accompanied by affidavit of merits. A trial was had, resulting in a verdict and judgment in favor of appellant for \$186.46. To reverse said judgment, this appeal is prosecuted. The principal ground relied on is the giving of the first and second instructions on behalf of appellee.

Said contract was in writing, and no question is made with reference thereto. Appellant entered upon performance of said contract and so continued, to and including December 31, 1925. No contention is made that he did not faithfully perform his duties, nor that he did not correctly report all sales made by him. No question is raised as to the amount of commissions paid appellant, the same being \$1,638.27. The evidence also discloses, that on January 2, after the termination of said contract, appellant closed a deal on an automobile, ^{and} received a down payment of \$200.00, which he retained.

It was insisted by appellees that they had an accounting with appellant on December 31, 1925, that it was ascertained that they were owing him \$342.52; that a check was issued therefor on said date, which check had the notation thereon "Commissions to date". Appellees insist that the retention by appellant of said \$200.00, was without right or authority; that at that time they owed him nothing, except for commissions that would be due on that sale. The testimony of appellees also is to the effect that, during the term of said contract, they had from time to time made settlements, and had paid appellant the commissions due at each ~~respective~~ time, returned checks being produced for such payments.

Appellant admitted the receipt of each of said checks, but denies that any settlement was made at such times, and claims that there were additional commissions due growing out of erroneous figuring of commissions where used cars had been taken in on trades. His testimony in this regard is as follows:

"I think that during the time of the contract I was paid \$1,500 or \$1,600, but I am not positive. I should say I should have been paid around \$2,500 or \$2,600. I received some money on all the transactions set up in the bill of particulars, but I ~~ea~~ claim they owe me more, because in each case of a trade-in they deduced the agreed price for the trade-in. I knew that the sums were insufficient from the beginning, but paid no attention to it and let it ride. I never went to the office to have an accounting and figure it up and accepted the checks as part payment on my commission."

Appellant testified that, during the year following December 31, 1925, he worked at selling insurance and oil burners, and that he made in all a little over \$1,200 that year.

It is first insisted that the court erred in giving appellees' second instruction, being as follows:

"The court instructs the jury that you should not allow in this case anything to plaintiff on account of refusal of defendants to continue the contract in question during the year 1926."

It is the contention of appellant that the evidence discloses that he advised appellees, prior to the termination of said contract, that he elected to take advantage of his option, and that while no written or formal verbal notice was given, that under the testimony, facts and circumstances, it was a question of fact for the jury, as to whether or not appellant had so elected to extend said contract.

Appellant testified that, in a conversation had with appellee Frank Strutzel some time before Christmas in the year 1925, he said: "I wanted to have a used car sale, and he said to go ahead and make the plans for it and I told him I wanted to have it right after the first of the year, the first nice day we would have, and he told me to make arrangements for my advertising. I had also ordered, through him, some photographic copies that the

Willys-Overland Company had for salesmen. I wanted these copies. I asked him for them and he said he would get them for me. I told him I wanted them for my two salesmen I expected to have, besides myself. This conversation was in the latter part of November. The factory man was there at the time, and he said he was going to get them from the factory for me for the spring lines of cars."

On cross examination appellant was asked the following questions and made the following answers thereto:

"Q. Isn't it true, Mr. Gibbons, that both Mr. Frank Strutzel and J. D. Strutzel had a talk with you on the 31st of December, 1925, for the express purpose and with the express understanding between you that they were going to close that place, and had mentioned that fact to you on several times prior to that?

"A. They had conversation--they had conversation, talked to me about discontinuing that place, and the subject was not brought up then for my opinion or anything else. I wasn't taken into it at all. The thing was not presented to me. We are closing up that place and you are through over there and we won't operate any further at that place. That is final."

"Q. What did you say then, when they told you that?

"A. I said to them I had a contract.

"Q. Yes, what else did you say?

"A. That if my contract was any good, that I was going on with it. That is what I said.

"Q. And was there anything further that you said on that occasion?

"A. I can't remember that I said further than that, excepting that I--that I specifically stated I had a contract and wanted to go on and was informed that I couldn't go on."

The foregoing is the substance of appellant's testimony offered as tending to prove notice to appellees. Appellees offered in evidence the following telegram:

"Gentlemen:

"J. D. Strutzel and Frank Strutzel, co-partners, doing business as J. D. Strutzel Auto Company.

"This is to advise you that, in accordance with the terms and provisions of my contract with you, dated the 29th day of July, 1925, I hereby elect to exercise the option therein contained and renew and continue said contract for one year from December 31, 1925, to wit, to and including December 31, 1926.

"Dated at Rockford, Illinois, this 1st day of January, 1926."

On cross examination, appellant testified:

"I had not attempted to give them notice in any legal form. The first time I tried to notify them in any form was in the telegram."

Appellees also testified, in effect denying that appellant had stated that he was relying on his contract and wanted to go on with the same, etc.

It is insisted by counsel for appellees that the only notice that the record discloses is the telegram in question, and that that was sent too late.

If that were the only evidence tending to show notice to appellees, it would not be sufficient. In view of the testimony of appellant as hereinabove set forth, it was a question for the jury as to whether appellant notified appellees of his election to extend said contract. His statement that the only notice given was said telegram, was a conclusion, and not a statement of fact.

Formal notice, either in writing or oral, is not necessary to be given to take advantage of an option and extend a contract, in the absence of a provision so requiring. See 35 Corpus Juris, p. 1019, sec. 148; 6 R. C. L., page, 605, sec. 28.

It is next insisted that the court erred in giving appellees' first instruction, being as follows:

"The Court instructs you that it was the duty of the

plaintiff, under his claim for prospective damages for the year 1926, to show and establish by the greater weight of the evidence that he tried to secure for himself a similar position after the contract was terminated, so as to earn as much money as he could in the same or similar line of work; and if the plaintiff has failed to so show, by the evidence, then you should allow nothing as prospective damages for the year 1926."

This instruction placed on appellant the burden of producing evidence in mitigation of damages. That burden was on appellees. Fuller v. Little, 61 Ill. 21-25; Ryan v. Miller, 53 Ill. 133-141-142; School Directors v. Orr, 88 App. 648-651; Hudson v. Yeomen of America, 176 App. 445-447; Metzler v. Pure Silk Mills, 242 App. 151-165.

It is the contention of counsel for appellant that his earnings while in the employ of appellees, as disclosed by the evidence, were proper to be considered by the jury in determining his damages for a breach of said contract, if the jury should find that notice of renewal had been given. On the other hand, counsel for appellees contend there is no sufficient basis for the awarding of damages by the jury.

In cases of this character it is proper to permit proof of a party's business and his profits for a reasonable period prior to the alleged breach. Chapman v. Kirby, 49 Ill. 211-217; I. C. R. R. Co. v. Burn, 205 Ill. 9-22; Landis v. Wolf, 206 Ill 392-399; Barnett v. Caldwell Furniture Co., 277 Ill. 286-289; Lewy v. Standard Elevator Co., 296 Ill. 295-303.

For the error in the giving of the above mentioned instructions, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

[illegible][illegible][illegible]

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

At Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

251 I.A. 6234

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In The
APPELLATE COURT OF ILLINOIS
Second District

October Term, A.D., 1923.

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| The First National Bank of |) | |
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| Morrison, |) | |
| |) | |
| Appellee, |) | |
| |) | Appeal from the |
| v. |) | Circuit Court of |
| |) | Whiteside County, |
| Fred Beswick, |) | Illinois. |
| |) | |
| Appellant. |) | |

OPINION by BOGGS, J.

On May 1, 1923, in vacation during the April term of the circuit court of Whiteside County, judgment by confession was entered against appellant and in favor of appellee for 1,733.82. On May 31, appellant filed a motion, supported by his affidavit, to vacate said judgment and for leave to plead, which motion was thereafter heard and denied at the same term. To reverse said order appellant prosecuted this appeal.

Said affidavit sets forth, among other things, that appellant and one R. W. Bull were engaged as a partnership in the feeding and marketing of cattle, and that in the operation of said business appellant and "the said R. W. Bull jointly borrowed money at the said First National Bank of Morrison, to pay for cattle, during the latter part of the year A. D. 1919 and during the first part of the year, A. D. 1920, * * * that the promissory notes given to the plaintiff to evidence said money borrowed were all signed by your petitioner and the said R. W. Bull in the manner following: that your petitioner signed said notes as maker and said R. W. Bull signed said notes across the back of the note,

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but all moneys so borrowed were deposited in said bank in the account of 'Bull and Beswick', or paid by said bank for the purchase of cattle by Bull and Beswick; that several lots of cattle were fed and shipped and, as returns from the cattle came into the partnership of Bull and Beswick from the sale of cattle, the sum^s were deposited in said bank to the account of Bull and Beswick, and at least partly paid off on notes at the said bank; that the feeding and shipping of cattle during said period was not profitable and the firm of Bull and Beswick sustained a loss on account thereof of something like Six Thousand Dollars, and Three Thousand Dollars of such loss was in the year 1920, owing to The First National Bank of Morrison, the said plaintiff; that a note was executed to the plaintiff for the sum of Three Thousand Dollars as evidence of said indebtedness by your petitioner, Fred Beswick, signing the note as maker, the same then and there being payable to the order of the plaintiff, The First National Bank of Morrison and the said R. W. Bull signed said note across the back; that said note and indebtedness thereby secured was, in fact, the joint obligation of your petitioner and the said R. W. Bull and the plaintiff then and there knew and understood that it was the joint obligation of your petitioner and the said R. W. Bull because of the fact that the said note was so drawn and executed to cover the indebtedness jointly owed to said bank by your petitioner and the said R. W. Bull; that said note was renewed from time to time and interest paid thereon, and each time said note was so renewed it was signed by your petitioner as maker to be signed across the back by the said R. W. Bull until the 9th day of April, A. D. 1925." That on said date the said R. W. Bull, his wife joining him, conveyed certain real estate to appellee "in release and discharge of the said R. W. Bull from and on account of all debts of every kind and character, due and owing to the said The First National Bank of Morrison." That at said time appellant and Bull owed to appellee bank \$3,000.00 as such partnership, the note therefor being signed by appellant as

maker and by R. W. Bull as indorser; that, having no knowledge of the release executed by appellee to Bull, appellant paid \$1,500 on said note; that the first he was advised of such release was in December, 1927, after said payment of \$1,500 had been made by him; that on November 5, 1927, being in ignorance of said release, appellant executed the note of \$1,500 on which the judgment here in question is based; that in December, 1927, appellant informed Bull that he had paid \$1,500 of said \$3,000 indebtedness, jointly owed by them, and that Bull then informed "your petitioner that the remaining sum of \$1,500, which the said R. W. Bull should have paid on said indebtedness, had been released and discharged by a written agreement." That appellant had frequently advised appellee that the payment of the \$1,500 which appellant had made on said \$3,000 note was his share of said indebtedness, and that the remainder thereof was owing by the said R. W. Bull; that at the time said note in question was given, that he, appellant, did not owe appellee bank anything.

As a part of his said affidavit, appellant set forth the contract entered into between appellee and Roy W. Bull and wife, which said written agreement, among other things, provides: "That in consideration of the conveyance by the parties of the second part (Roy W. Bull and wife) to the party of the first part of the three farms owned by the parties of the second part, * * * the party of the first part hereby releases and discharges the parties of the second part from and on account of all debts of every kind and character due and owing to the party of the first part, except the party of the first part hold and retains for and on account of said indebtedness, pledged life insurance policy on the life of Roy W. Bull for the principal sum of seven Thousand dollars and holds and retains all notes which have been endorsed by the parties of the second part to the party of the first part."

The question for our determination is as to whether said affidavit on its face is sufficient to show a meritorious defense. If so, appellant should have been given leave to plead.

Where an affidavit shows that an applicant to have a judgment opened up and for leave to plead has a legal defense, or one that is triable by a jury, the court should grant the application. *Gilchrist Transportation Co. v. Northern Grain Co.*, 204 Ill. 510-514; *Fialer v. Bishop*, 198 App. 558-560; *Schmalhausen v. Zukowski*, 183 App. 305-307; *Guster v. Herman*, 105 App. 76-87.

Counsel for appellee do not question this proposition, but insist that, under the Negotiable Instruments Act, the maker of a note signed as the note here in question was signed, is liable therefor, and that the indorsement thereon does not render the indorser liable, except in the event that the maker cannot be made to satisfy the same. While this is correct yet in the hands of the original payee, a maker has the right to show any legal defense he may have as against the payee. *Cahill's Stat. Chap. 98, art. 4, sec. 58*; *Cohen v. Wolffs*, 242 App. 50-55; *United Boiler Co. v. Ackerman-Quigley Printing Co.*, 236 App. 111-119; *Weinstein v. Sprintz*, 234 App. 492-494.

In *Drum Construction Co. v. Forbes*, 305 Ill. 303, the court at page 306 says:

"Section 27 of said Act (Negotiable Instruments Act) provides that 'a holder in due course holds the instrument free from any defect of title or prior parties, and free from defenses available to prior parties among themselves,' with certain exceptions. The act, in using the term 'holder in due course,' used it as an equivalent for the old expression, 'bona fide holder for value without notice'. (8 Cor. Jur., 464.) The act, insofar as it defines a holder in due course, does not change the common law rule as to who is a bona fide holder, except, perhaps, by eliminating the requirement that the transfer must be in the regular course of business. (8 Cor. Jur., 465.) Section 58 of the act provides that 'in the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable.'"

To the same effect is 5 R. C. L. 1031. If, therefore,

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appellant's affidavit shows on its face a meritorious defense, the court should have allowed said motion, and should have given appellant leave to plead. The affidavit specifically alleges that the indebtedness for which the note of \$3,000 was given was the indebtedness of appellant and R. W. Bull, growing out of their partnership transactions, and that appellee bank was fully cognizant thereof. Appellant's affidavit for the purposes of this motion is to be taken as true. It therefore, follows that he should be permitted to show by oral or documentary evidence the joint liability of himself and R. W. Bull for said indebtedness. *Dreyfus & Co. v. Union National Bank*, 164 Ill. 83-86, citing *Farwell v. Hutson*, 151 Ill. 239.

Counsel for appellant insist that the memorandum of agreement between appellee and Bull, attached to said affidavit, shows on its face that said agreement was not to operate as a release as to any notes held by appellee on which R. W. Bull was indorser, and that said release would not operate to discharge appellant on said note.

The exception in said agreement is as to notes "indorsed by the parties of the second part." The parties of the second part in said agreement are Roy W. Bull and Hannah E. Bull. Strictly construed this exception would only refer to notes indorsed by both of them.

That the release of one joint debtor or obligor operates in law to discharge the other is well established. *Winslow v. Leland*, 128 Ill. 304-336-337; *Clark v. Mallory*, 185 Ill. 227-233; *Rice v. Webster*, 18 Ill. 331-333; *Hemmick v. E. O. S. R. R. Co.*, 263 Ill. 241; *Petroyeanis v. Pirola Co.*, 205 App. 310. This same principle of law applies to a partnership indebtedness. *Fleming v. Ross*, 225 Ill. 149.

The trial court erred in refusing to grant said motion, giving to appellant leave to plead, letting the judgment stand as security until the final determination of the cause.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court



abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-eight, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

251 I.A. 023⁵

BE IT REMEMBERED, that afterwards, to-wit: On

Vol. 102 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

| | | |
|--------------------------------|---|------------------|
| EUGENE BOLLE, Appellant, | : | |
| | : | |
| v. | : | Appeal from the |
| | : | Circuit Court of |
| CHICAGO AND NORTHWESTERN RAIL- | : | Lake County. |
| WAY COMPANY, Appellee, | : | |

JONES P.J.

This cause was before us on a former appeal from a judgment in favor of appellant, Bolle. This court held that at the time of his injury, he was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. The judgment was reversed and the cause remanded. Whereupon Bolle filed an affidavit which stated that upon another trial, he could offer no additional evidence to support his contention that he was engaged in interstate employment. He asked that the order remanding the case be stricken so that he might have the case reviewed by the Supreme Court. We accordingly struck the remanding order. (Bolle v. C. & N. W. Ry. Co. 235 Ill. App. 380.)

The judgment of this court was later reversed by the Supreme Court and the cause remanded to this court with directions for us to either affirm the judgment or reverse it and remand the cause. (Bolle v. C. & N. W. Ry. Co. 324 Ill. 479.) This court then caused its opinion to be refiled without change, except that the cause was remanded in compliance with the order of the Supreme Court.

The second trial in the circuit court resulted in a judgment in favor of appellee upon a directed verdict at the close of all the evidence. The action of the trial judge in directing a verdict in favor of appellee was based upon his conclusion that the appellant was not engaged in interstate commerce when he was injured. When the case was before us on the former appeal, we reached the same conclusion and

so expressed it. However, the Supreme Court took a different view and on page 482 in *Bolle v. C. & N. W. Ry. Co.*, supra, said, "Whether or not at the time of the accident plaintiff was employed in interstate commerce was a controverted question of fact upon which plaintiff had a constitutional right to a trial by jury. This question of fact was the main issue in the case. Whenever an issue is made in a case and evidence must be introduced to maintain the issue, controverted questions of fact are involved which include not only evidentiary facts but ultimate facts, even though there be no conflict in the testimony. (*Chicago Title and Trust Co. v. Ward*, 319 Ill. 201; *Frank v. Hoskins Co.* 323 id. 46.) The evidence in the case was not such that all reasonable minds must necessarily agree that at the time of the accident plaintiff's employment was not such as to bring him within the provisions of the Federal Employers' Liability Act. It was therefore error for the Appellate Court to reverse the case without remanding the same."

Counsel for appellant insists that in the record on this appeal there is additional evidence tending to show appellant was engaged in interstate commerce, while counsel for appellee contend there is in effect no additional evidence on that question. It is our opinion that the evidence on that issue was substantially the same on both trials.

It would seem to follow as a logical conclusion that if the Appellate Court erred in holding the plaintiff was not engaged in interstate commerce, then the trial court erred in holding that he was not so engaged. The Supreme Court held the question was one of fact to be submitted to a jury.

It is therefore necessary to reverse and remand the cause so that the issue may be tried by a jury.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

251 A. 624'

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

| | | |
|------------------|---|--------------------------|
| JAMES N. HUSTON, | : | |
| | : | |
| APPELLANT, | : | |
| | : | |
| v. | : | APPEAL FROM THE CIRCUIT |
| | : | COURT OF LASALLE COUNTY, |
| W. B. FUSEY, | : | ILLINOIS. |
| | : | |
| APPELLEE, | : | |

JONES P.J.

This cause was before this court at a former term on writ of error. (Huston v. Fusey, 243 Ill. App. 127). James N. Huston instituted a suit against W. B. Fusey, to recover \$213 alleged to be due him as a part of the selling price of certain real estate. At the close of the evidence on behalf of plaintiff, the trial court directed a verdict in favor of defendant. On review, this court held that the evidence on behalf of plaintiff was sufficient to require the case to be passed upon by a jury. The judgment was reversed and the cause remanded. A retrial was had and a verdict rendered in favor of defendant. Judgment was rendered thereon in bar of the action and for costs. This appeal is from that judgment. The facts are sufficiently set forth in the former opinion of this court.

The principal issue of fact in this record relates to the terms of defendant's contract with plaintiff for the sale of the premises in question. Whatever agreement they had, if any, was verbal. It is the contention of plaintiff that nothing was said about defendant's compensation, but that he expected to pay a commission out of the price of \$350 which he had finally set upon his property. Defendant testified that all of their negotiations as to the sale price were on a basis of the net price to plaintiff; that at the time the price of \$350 was fixed, the plaintiff agreed to take \$350

net out of the sale, and that the defendant was to have all over that amount for expenses and services.

The property was sold for \$600, and when the deed was made, the plaintiff did not inquire what price defendant received, and the defendant did not ~~inqua~~ then inform him, but said:- "Well, Mr. Huston, I have made a good sale and you shall have your \$350." Later, he told plaintiff the sale price when asked about it.

On the first trial, it appeared that when the deed was executed, defendant stated he had forgotten the name of the purchaser, but on the last trial, the record shows that the name of the grantee was in the deed at the time it was executed, and that there was nothing to prevent the plaintiff from seeing it. He took the deed to a bank to be held pending the payment of the \$350. He made no offer to pay defendant any commission and made no inquiry whatever about defendant's compensation until he learned what the defendant had sold the premises for. The price plaintiff received was quite satisfactory until he learned that defendant had received \$600 for the land.

Defendant paid all the expenses of extending plaintiff's abstract of title, and expended \$100 or more for advertising and other expenses in consummating the sale. According to the testimony in behalf of plaintiff, the usual commission for the sale of such property is 5%. It is improbable that defendant would have incurred the expense he did in order to receive a commission of \$30. Whether or not defendant was to have all of the sale price over and above \$350 for his expenses and services was a question of fact for the jury.

^{la}Complaint is made to the giving, refusing, and modification of certain instructions. We have examined the instructions and have considered the objections to them, but find no reversible error. The case seems to have been fairly tried both on the law and facts.

Judgment affirmed.

net out of the sale, and the balance of the sale was

that amount for expenses and interest.

The property was sold for \$100,000.

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error. The case seems to have been

and facts.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

affirmed
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2511A.624²

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



| | | |
|----------------------|---|-----------------------------|
| Edward J. Gallagher, | : | |
| | : | |
| Appellant, | : | Appeal from the |
| | : | Circuit Court of Jo Daviess |
| v. | : | County. |
| | : | |
| John T. Hayden, | : | |
| | : | |
| Appellee, | : | |

Jones L. J.

This is a suit in assumpsit by Edward J. Gallagher, against John T. Hayden, for money claimed to be due on an open account. The jury found the issues in favor of the defendant and judgment was entered accordingly.

The declaration, filed May 15, 1923, avers that on April 28, 1924, defendant was indebted to plaintiff in the sum of \$1531.18 for money loaned. The copy of the account attached to the declaration states that it is for moneys loaned by plaintiff to defendant and moneys paid out by plaintiff for defendant at plaintiff's request, to the amount of \$1375.93, together with .601 interest. The bill of particulars filed by plaintiff shows one account for moneys advanced to plaintiff, or paid out at his request, with interest thereon, running from September, 1918, to May, 1923, and also another account for moneys advanced for telephone rentals and interest thereon from March 31, 1919, to February 15, 1923. The last item on either account is for \$1.66 dated May, 1923. All other items bear dates more than five years prior to the filing of the declaration. Defendant pleaded the general issue and the statute of limitations. Under the plea of the general issue, he was permitted to offer proof of payment, and accord and satisfaction over the objection of plaintiff.

The parties to this suit are brothers-in-law. Plaintiff was unmarried and lived with his sister, Elizabeth Gallagher, now deceased, in Galena, Illinois, near which city defendant was

engaged in farming. The evidence tends to show that plaintiff loaned defendant different sums of money from 1918 to 1922. On cross examination of plaintiff, he admitted having received certain checks in evidence made to his order, signed by defendant and corresponding in amount to some of the items in the bill of particulars, for which he had not given defendant credit, but as to those items which defendant was unable to produce any cancelled checks, he denied having received payment. He testified that the item of \$1.66 was for a pair of overalls purchased for defendant from Montgomery Ward & Company. Defendant denied that plaintiff had ever purchased any overalls for him.

In January, 1917, defendant and his wife gave their note for \$2100 payable "to Edward or Elizabeth Gallagher" and on January 8, 1918, another note payable "to Edward or Elizabeth Gallagher" for \$665. These notes were for borrowed money. Each of them bore five per cent interest. After the death of Elizabeth Gallagher, plaintiff presented the notes to defendant for payment, and they had several conversations relative to the payment of interest. The defendant claimed that there was an understanding between Gallagher and his sister, Elizabeth, on the one hand and the defendant and his wife, on the other, that certain wood, butter, meat, poultry and other produce furnished by plaintiff to defendant from his farm during the period the notes ran, should be accepted as payment of interest on the notes and for the money borrowed of plaintiff which had not been repaid in cash. It appears that after several discussions of the matter, defendant paid plaintiff \$3906.00 on July 11, 1925, and the notes were then surrendered. Defendant testified that an argument over the interest arose and plaintiff said that if the defendant would pay the interest, he, the plaintiff, would call everything square, and in consideration of that statement, defendant paid the interest and included it in the said check for \$3906.00.

Plaintiff testified that certain items of his account were for cash advanced by him to defendant, and that in April and

July, 1924, defendant promised to ^{pay} him everything he owed him. Defendant denied he ever received any cash from plaintiff at any time, and denied having acknowledged any debt to plaintiff or having promised to pay him any debt within five years prior to the filing of the suit.

The claims of the respective parties rest almost wholly upon their own testimony. The jury saw and heard them testify, and having considered the respective contentions, found in favor of the defendant.

There was no error in admitting testimony in regard to payment under the general issue. It is not necessary to plead specially any defense that may be properly offered under that plea. Payment and release may be offered in evidence under it. (Counter v. Traveler's Protective Association, 144 Ill. App. 255; Masling v. International Tank, 74 Ill. 16; Chicago W. & N. Coal Co. v. Peterson, 45 Ill. App. 307; O'Brien v. O'Brien, 75 Id. 263; Crews v. Bleakley, 16 Ill. 12.)

By consent of a creditor, payment may be made other than in money and it was not error to admit testimony on that subject. (30 Cyc. 1187; Ryan v. Dunlap, 17 Ill. 40; Crews v. Bleakley, supra.) We are of the opinion that testimony tending to show an accord and satisfaction is also admissible under the general issue. In an action of assumpsit, the general rule is that a defendant may give in evidence, under the general issue, any matter which shows he was not indebted to the plaintiff when the action was brought. And this is true, whether the defense be that defendant was never indebted to plaintiff, or that the liability has been extinguished after it was incurred. (Wilson v. King, 83 Ill. 232; Harrison v. Shackaberry, 248 Id. 512; 1 C. J., Accord and Satisfaction, Section 111, para 573.)

A considerable portion of plaintiff's brief and argument is devoted to a discussion of the law of recoupment and set-off. The defenses raised by defendant were confined solely to the questions of payment, accord and satisfaction, and the Statute of Limitations.

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The court did not err in refusing to admit in evidence the will of Elizabeth Gallagher. We have examined it and its provisions shed no light on any of the issues in this case.

Certain instructions given in behalf of defendant told the jury that the burden of proof is upon the plaintiff to establish his case by a preponderance of the evidence. It is insisted that the burden of proof was on the defendant to establish payment and to substantiate his plea of the Statute of Limitations. Plaintiff's sixth and seventh instructions fully informed the jury that in pleading the Statute of Limitations, defendant assumed the burden of proof and could not prevail on that plea without proving it by the greater weight of the evidence. Other given instructions on the question of payment were of like import and were properly given.

This litigation between brothers-in-law had been presented to a jury for consideration, and the jury has found the issues for the defendant. The case was fairly submitted on both the law and the facts, and as no reversible error appears in the record, the judgment of the trial court should be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court



abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-eight, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2511A. 624³

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

| | | |
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| The People of the State of | : | |
| Illinois, | : | |
| Appellant, | : | APPEAL FROM THE |
| | : | COUNTY COURT OF |
| v. | : | CARROLL COUNTY. |
| | : | |
| Robert Peters, | : | |
| Appellee, | : | |

JONES P.J.

This is a bastardy proceedings in which the jury returned a verdict of not guilty. The court denied the motion for a new trial and entered judgment on the verdict.

The complaining witness, Edna Eiseman, on January 1, 1927, was between seventeen and eighteen years of age. On the night of that day she went with her younger sister, Sadie, and the latter's friend, Ed Boeger, to a dance at Shannon in Carroll County in an automobile. The father of the complaining witness was a farmer whose family consisted of his wife, and several children other than Edna and Sadie. The defendant, Robert Peters and Harold Mitchell, neighbor farm boys, went to the same dance in a car operated by the defendant. During the evening, Boeger asked the defendant if he would take Edna home in his car, and the defendant consented to do it. About eleven-thirty o'clock they left the dance hall, Boeger and Sadie in Boeger's car, and the defendant and Edna in the defendant's car. All started for the home of Gus Bromeyer, husband of one of Edna's older sisters. It is claimed by the defendant that Harold Mitchell was in the car with him and Edna on the return trip and that they stopped at Harold's house to let him out. Mitchell testified that the defendant took him home and that the three occupants of the car were in the front seat. This testimony is contradicted by the complaining witness, her brother, Arthur, her sister, Sadie, and Boeger, who is now Sadie's husband.

According to Edna's testimony she and the defendant had an act of intercourse during the trip from Shannon to her

sister's, Mrs. Bromeier. She does not claim that they ever had intercourse at any other time. The distance from Shannon to her sister's home was about seven miles over a rough, dirt road. Edna testified that they were about forty-five minutes in making the trip, including ten minutes' stop at the time of the intercourse. There is no evidence indicating that the defendant used any force or violence. Sadie and Boeger reached the Bromeier home sometime before the defendant Edna arrived. The course taken by the defendant in going by the home of Mitchell was longer than the one taken by Boeger.

When the defendant and the complaining witness arrived at Bromeier's home, they went in and the defendant stayed about ten minutes. Edna stayed all night. She claims she told her sister, Sadie, what had happened, and showed her silk stockings which had been torn at the knees. She did not tell her married sister, her mother, or any other member of her family. She testified that her last menstrual period was about December 15th, and the next one was due about January 5th; that a few days after January 5th she wrote to the defendant that she had something to tell him. He made no response and she said that she again wrote him sometime after Decoration Day, and that he made no reply. The defendant testified he never received either communication. A child was born 266 days after the alleged act of intercourse.

The defendant denied having sexual relation with the complaining witness either on January 1, 1927 or at any other time. He further denied that he had ever kept company with her on any other occasion, except that about two years prior he had been in her company a short time with another couple and that it was not he, but a young man by the name of Fay Zier, who paid her special attention at that time. Several neighbors and acquaintances testified that the general reputation of the complaining witness for truth and veracity in the neighborhood in which she resided was bad.

As grounds for reversal, it is urged (1) that the verdict is against the manifest weight of the evidence, and (2) that the Court gave erroneous instructions on behalf of the defendant. We have set forth the substantial parts of the evidence. The instructions complained of are the fifth, eighth, and ninth given on behalf of the defendant. No instructions were tendered by the People.

The fifth instruction told the jury that if they believed from the evidence that the complaining witness or any other witness has intentionally sworn falsely as to any material matter in this case, and such witness has not been corroborated by other evidence or circumstances in evidence, then the jury have the right to disregard the testimony of such witness entirely. This instruction should not have mentioned the complaining witness. However, it was not directed against her alone, but included all other witnesses and was equally applicable to all. She was the only witness upon whose credibility a direct assault was made, and while we think the instruction was not carefully drawn, still, under the record in this case, we believe whatever error it contains, worked no prejudice against the People or the complaining witness. (Stevens v. People 215 Ill. 593.)

The eighth instruction told the jury that they are not at liberty to disregard and refuse to consider the testimony of the defendant; that under the law he is a competent witness in his own behalf; and that it is the duty of the jury, under their oaths, to give the testimony of the defendant in this case the same careful consideration that they give the testimony of the other witnesses. It is the law that a defendant is no longer an incompetent witness. He is by statute made competent to testify in his own behalf and it is the duty of the jury to give his testimony fair consideration and to test it by the same rules by which the testimony of other witnesses are tested. The instruction as it is usually framed informs the jury that they

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have no right to disregard the testimony of the defendant merely upon the ground of caprice or because he is in fact the defendant. The correctness of such a legal statement cannot be questioned. It is obvious that the jury ought not to disregard the testimony of a witness, simply on account of caprice or because he is a defendant, or for any reason which might not be invoked against other witnesses. The fact that the expression ordinarily contained in instructions of this character has been omitted from the instruction given does not make it erroneous. So far as we are concerned, we observe no good reason why such an instruction should be given at all. The law is fixed and definite. The common law rule disqualifying a defendant from testifying has been abolished. He now has a right to testify in his own behalf and to have his testimony tested by the same rules that are applied to other witnesses. It seems to us that the instruction, whether in the present form or in the ordinary form, is but a mere statement of an abstract proposition of law and would better be omitted.

The ninth instruction told the jury that both the plaintiff and the defendant are competent witnesses and if one swears that the defendant is the father of the child, and the other that he is not, then, if they are of equal credibility, the one offsets the other; and unless further evidence given by other witnesses for the People or circumstances proven, give the preponderance for the plaintiff, the verdict should be for the defendant. While this instruction does not quite meet with our approval, it substantially states a correct proposition of law, to-wit; that if the complaining witness and the defendant are of equal credibility, and the testimony of the complaining witness is offset by that of the defendant, then, unless the testimony of the complaining witness is corroborated by other testimony or by facts and circumstances in evidence, the

verdict must be for the defendant. This is but another form of the instruction so often employed which tells the jury that if they believe the evidence is equally balanced between the plaintiff and the defendant, they must find for the defendant.

The facts in this case were submitted to a jury of twelve men. The decision very largely rested upon the testimony of the interested parties. Their testimony was in direct conflict. The jury does not appear to have acted from prejudice, bias or passion. They had the best possible opportunity to judge the credibility of the witness and the weight to be given to their testimony. There is no good basis for us to say that their finding is against the manifest weight of the evidence. The instructions, although subject to some just criticism, were not prejudicial to the complaining witness or to the People. We are therefore of the opinion that this cause should be affirmed.

Judgment affirmed.

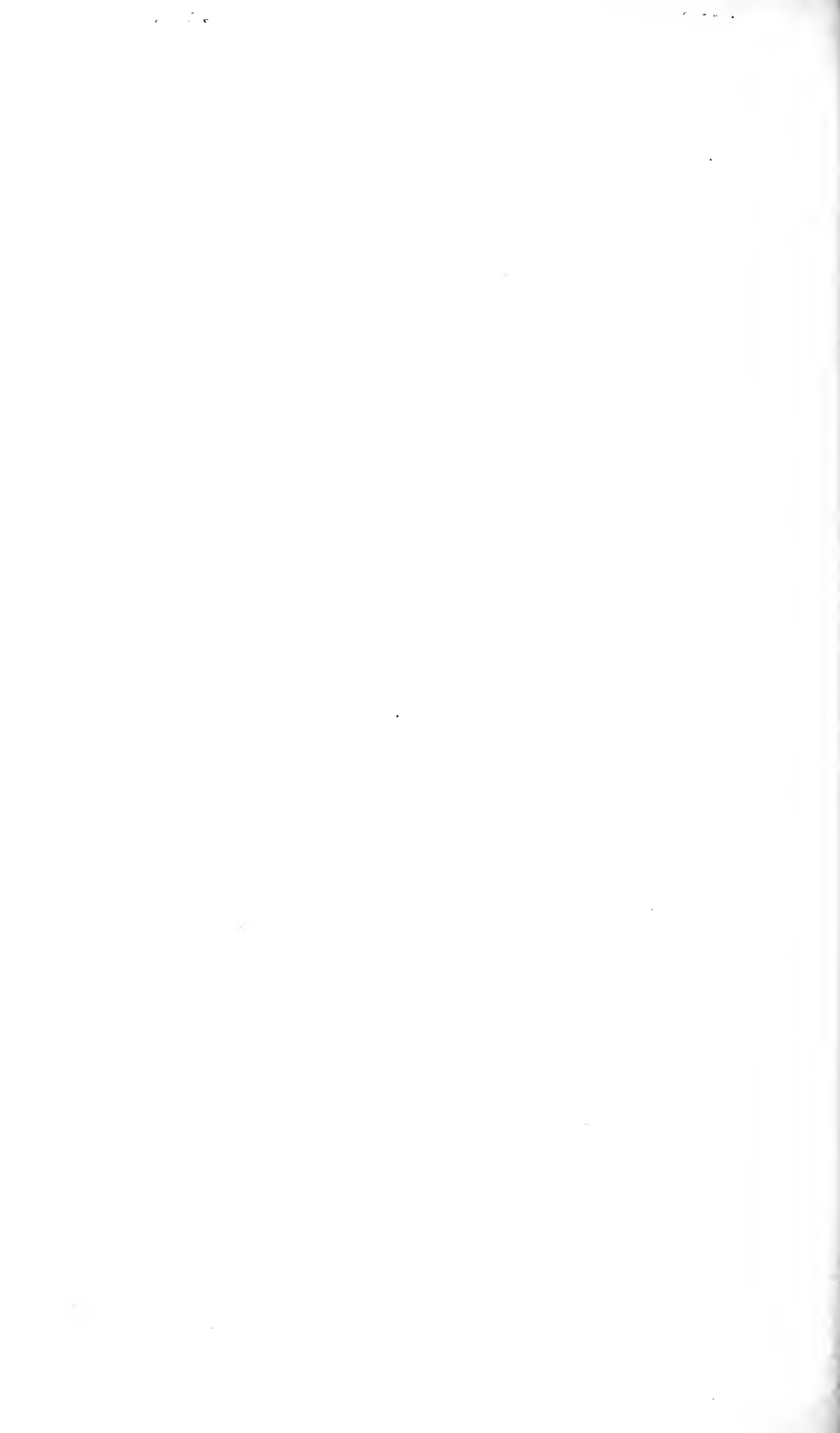
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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court



in fact

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

251 I.A. 624⁴

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



DEE ELLEN DADY,

appellant,

vs

RALPH JOHN DADY,

appellee,

APPEAL FROM THE

CIRCUIT COURT OF LAKE
COUNTY.

Ralph John Dady,

Cross-Complainant,

vs

Dee Ellen Dady,

Cross-Defendant & appellant

Jett, J.

This cause comes here on an appeal by Dee Ellen Dady from a decree of the Circuit Court of Lake County dismissing for want of equity an original bill for separate maintenance and granting Ralph John Dady, appellee, a divorce on a cross-bill which was filed by him based on desertion. The decree provided that Dee Ellen Dady the appellant should receive \$250.00 per month for the care, maintenance and support of herself and their children and the use of a dwelling house owned by appellee, he to pay the taxes and upkeep.

The record shows that the parties to this proceeding were married on November 9th, 1912. They separated on June 25th, 1922. Four children were born of the marriage, three of whom are living. Ralph John Dady is a lawyer and has been practicing about twenty-four years; has been states attorney of Lake County; has been for several years last past engaged in private practice and at the time of the pendency of this proceeding was master in chancery of the Circuit Court

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On February 19th, 1923, Dee Ellen Dady filed her bill for separate maintenance in the Circuit Court of Lake County. On February 20th, 1923, Ralph John Dady, the appellee, filed exceptions to certain provisions of the bill as being scandalous and impertinent; which exceptions were sustained on March 19th, 1923. The bill was not amended but was stricken from the docket on March 9th, 1927, and reinstated on October 3rd, 1927. No rule was entered on the defendant in the bill for separate maintenance to file an answer and no answer was filed until November 18th, 1927 which answer denied the material allegations of the bill so far as the question of whether appellant was entitled to separate maintenance was concerned. On the day appellee filed his answer leave was obtained by him to file a cross bill which he did asking for a divorce on the ground of desertion, alleging that appellant without just cause deserted him on June 25th, 1922.

The record further shows that on November 16th, 1927, before the said answer and cross-bill were filed notice was served on appellee that on November 18th, 1927, appellant would move that an order be entered directing the payment to her of \$500.00 per month alimony and \$1,000.00 solicitor's fees, and a petition for increase of alimony and for solicitor's fees was accordingly filed on said last mentioned date.

The record further discloses that before the petition for an increase of alimony was filed counsel for the appellant wrote to appellee that appellant wanted a divorce and that her counsel would like to have a conference on the question of adjustment of property rights and her terms were \$500.00 per month. The appellant filed a demurrer to the cross-bill which was by the court overruled. Answer was filed by the appellant to the cross-bill and replications were filed to answers. A hearing was had on the original bill for separate maintenance, the answer thereto, the cross-bill and the answer and the petition for increase in alimony and it was upon

this hearing that the decree was entered as above indicated and this appeal followed.

A number of reasons are assigned for a reversal of the decree. The principal reasons are that the court erred in dismissing the original bill for separate maintenance for the want of equity and in granting a decree for divorce on the cross-bill. We will first consider the question of the dismissing of the original bill. Appellant in her brief says, "The story as disclosed by the evidence shows that the parties hereto have quarreled frequently since their marriage and that as the years of their married life increased these quarrels became more frequent and more bitter. * * * * * The undisputed fact remains that the home of these parties was far from being a center of love and companionship." Appellant's testimony discloses her frame of mind and shows that she was dissatisfied and fault finding. She testified that early in their married life appellee refused to give her an allowance but gave her pin money from time to time; that he was cruel and unkind; that if they ever spoke they were quarreling and there were no tender words exchanged to speak of; that they began quarreling about three weeks after their marriage; that perhaps there would be a lapse of a week or several weeks but that conditions gradually grew worse; that they started quarreling about money about the time the second child was born; that he was too close on money matters; that they had an argument about the first dress she bought; that they often said they could not get along together at all; that he told her he would boss his home; that she and appellee "just seemed like two electric wires that were crossed", and there was constant confusion; that there seemed to be no agreement on anything or any subject; that they argued back and forth all of the time and that the situation was most unpleasant and disagreeable; some days they would hardly speak unless it was absolutely necessary; that he refused

invitations to dances; that they had terrible arguments, fighting and quarreling while at a restaurant at dinner.

It is quite apparent that the appellant had and reflected the morbid view that there was never anything pleasant about their married life. According to her testimony when they were married neither of them had any means to speak of and the furniture with which they went to housekeeping was bought on payments. If this be true he was obliged to be economical. He paid her expenses to and from Oklahoma three or four times. He paid the expenses of one of her sisters to and from Oklahoma three times and of another sister one time. He paid the expenses of two sisters in business college in Waukegan, and a baby sister stayed with them several months. She says that in December 1925 he gave her \$100.00 extra for the children's Christmas and \$200.00 for herself for a coat and that she paid the entire \$300.00 on a fur coat which cost \$345.00. When they separated appellant was being furnished a car to drive; she had a charge account at Marshall Fields and Carson Pieries; that she was the owner of some oil stock which she had purchased with the savings he had furnished her.

No order as to payment of alimony was entered and no motion made therefor, until July 28th, 1924, at which time an order was entered that appellee pay \$250.00 a month. No order was ever entered that appellee pay more than \$250.00 per month yet in addition to these items he paid the rent, the coal bills and the bill for the children's dancing and music lessons. In 1926 he paid to or for appellant and the children the sum of \$4622.60. In 1927 up to December 17th he had paid out for appellant and the children \$3758.34. On August 25th, 1926, at the request of appellant and with her approval appellee bought a house for her and the children to live in which cost him approximately \$18,000. He purchased for such house furniture costing almost \$4,000.

We have inserted these facts for the purpose of showing

the attitude of appellee towards appellant and of appellant towards appellee. As we understand the rule before the wife is entitled to separate maintenance she must be living separate and apart from her husband without fault on her part. The wife must show not only that she has a good cause for living separate and apart from her husband but that such living apart was without fault on her part. Decker vs Decker, 279 Ill. 300-304.

If the wife's misconduct has materially induced the cause of action on the part of the husband upon which she relies as justifying the separation it is not without her fault. Johnson vs Johnson, 125 Ill. 510-515.

In view of what is disclosed by the record we are of the opinion that the complainant in the original bill failed to establish the fact that she was living separate and apart from her husband without fault on her part and that the court did not err in the dismissing of the original bill.

The next question to be considered, did the Chancellor err in granting the prayer of the cross bill of appellee? The cross bill, after alleging the marriage, charges that on June 25th, 1922, appellant wilfully deserted and abandoned herself from the appellee without any reasonable cause, and without any reasonable cause, has ever since persisted, and still persists in such desertion. This was the ultimate fact that had to be proven, and all other facts proven were merely evidentiary facts, going to prove the ultimate facts. Only ultimate facts need be alleged in a pleading.

Karcher v. Citizens State Bank, 183 Ill. App. 49;
Lavia v. W. C. R. R. Co. 54 Ill. App. 636-642.

To the cross bill, appellant filed a general demurrer, which was overruled; appellant then filed an answer; the answer merely denying in general terms, that she had deserted appellee, and did not set up any facts showing an affirmative defense to the cross bill. Had she set up facts showing an affirmative defense, it might or might not have been necessary for appellee

to have amended his cross bill so as to anticipate such defense, but this was not the case. The authorities cited by appellant hold that a bill in chancery must allege every fact necessary to the relief prayed for, are not in point and do not hold that any more is required in such a bill than the pleading of the ultimate facts. Appellee, in support of his cross bill, among other things testified that on the evening of June 24th, 1922, he had finished the trial of what is known as the "Governor Small Case"; that during the evening appellant said something about a lady friend of hers wanting to go to a party; that he told appellant he was too tired and was exhausted; that he had been in the trial of the case five or six weeks and did not like to go to any dance or party; that after supper he and appellant drove to the cemetery where his mother was buried; at the cemetery he got out of the car, and appellant said she wanted to take a drive; he understood she was coming back; that he went into the cemetery and cut the grass from his mother's grave, that he finished in about three quarters of an hour, and looked for appellant, she did not come. He walked home, a distance of a mile and a half or two miles; he got to his home shortly after dark, that appellant was not at home; that the children and maid had gone to bed; that he sat up awhile and went to bed about 10:00 P.M. and went to sleep; that he was awakened between 12:00 mid-night and 1:00 o'clock, A.M., by appellant being in the bed room undressing, and that he said "It is late isn't it?" and she replied "No, it is early;" that she undressed and he asked her where she had been, and she didn't tell him; that he lay there in bed awhile beside her; that he could not sleep; he got up without saying anything, and put on his bath robe and went into the front room and switched on the light and lit a cigar and began reading the paper; that appellant came in and said "I want an understanding with you, I want you to get out of here, I want a divorce." That in response

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thereto he said "I never heard so much about divorce, what do you want of a divorce?" She said she was not going to live with me any more; "It is either you get out or I get out," that then he said "When do you want me to get out?" and her answer was "right now." He said he would get out and that he proceeded to get his things and took them to the kitchen, and then took them to the car; that the car was locked; that he went in the house and asked her for the key; that she told him the key was by the clock, he looked and could not find it; she said he could not take the car and he said he was. There was an extra key which they kept in the dresser, he started looking for that; she come up to the dresser to push him away, and he stuck out his hand but didn't hit or strike her; that he pushed her back with his hand, and that she scratched both sides of his face so that the blood came, and scratched the back of his neck; that as she did this he grabbed her by the wrist or arm, and kept her away from him; that she then came at him and bit him in the face; that he held his face back; she then bit him on the hands, he pushed her back and she went to the floor; that he left the house carrying his things out to the garage; that the car was locked; he rolled it out into the street, where, by means of a decline, he ran the car in front of his father's home; that he then called at the home of Mr. and Mrs. Erskine, and woke them; his father was temporarily staying at Gage's Lake. That Mrs. Erskine got some water and washed the blood from his hands and face; Mr. Erskine drove appellee to where appellee's father was staying; that the marks and scratches were on appellee's face for the better part of a week, and that he stayed away from the office for about three days; that he never hit or struck appellant; that he did grab her on different occasions to try to prevent her from hitting him.

Appellee was corroborated by Lewis E. Erskine, who is aged about 65 years, and is Purchasing Agent for the Board of Education of Waukegan, who testified that on the night of June

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KEY WORDS: aging; depression; health status; life expectancy

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24th, 1922, about 4:00 A.M. on answering the door-bell, he saw appellee in the door, covered with blood, with a handkerchief saturated with blood, in each hand; that there were scratches on the face of appellee; that there were also scratches on the back of his neck and ears; that the marks on the cheek bones were deeper than the others.

Appellee was also corroborated by the witness Arthur Buckley, Corporation counsel of Waukegan, who testified that during the week following the Small trial, he saw appellee on the street in an automobile talking to Mr. Smith, the State's Attorney; that appellee's face on both sides was a mass of scars, more than scratches, furrows running from his temple down, lacerations running practically from a point even with his eye-brows down to his cheeks, and coming down over his cheek bones.

In relation to what took place at the home of the parties to this proceeding on the night of June 24th, 1922, the appellant gave her version of the transaction, which is quite different from that of appellee. We have carefully examined the record and we are of the opinion that it shows that appellee conducted himself in a fit and proper manner, and was a kind indulgent husband towards his wife and family. That he was extremely liberal in furnishing comforts and necessities to his wife and children, and that she, on the contrary, was dissatisfied, discontented, and manifested her discontent in many ways; that on the day that he finally left home, and previous occasions, she had informed her husband she wanted a divorce; that by reason of her conduct, on her part, the appellee was justified in leaving when he did, and that his leaving, under the circumstances, constituted desertion on her part. The spouse, who, by his or her act, intentionally brings the cohabitation to an end, is guilty of desertion. Hence where a spouse intentionally brings the habitation to an

end by mis-conduct, which renders the continuance of the martial relations so unbearable, that the other leaves the family home, the former, and not the latter, is the deserter.

19 Corpus Juris Cl.

In Johnson vs Johnson, 125 Ill. 510-515, the court said, "If the husband voluntarily does that which compels the wife to leave him, or justifies her in so doing, the inference may be justly drawn that he intended to produce that result, on the familiar principle that sane men usually mean to produce those results which naturally and legitimately flow from their actions. And if he so intended, her leaving him would, in the case put, be desertion on his part, and not by the wife." The same rule would apply to the wife under the same circumstances.

It is insisted however, by the appellant, that the absence of the wife from appellee, pending the adjudication of the separate maintenance proceeding, cannot constitute the basis of his cross desertion charges. Appellee insists that the record shows that there was no reasonable ground for filing the bill and that the same was not filed in good faith, and that when it was not, as a matter of fact, filed in good faith, there is no presumption that she acted in good faith, where there was no foundation for her action.

Was the separate maintenance proceeding instituted in good faith?

Appellant filed her bill for separate maintenance on February 18, 1923. No order as to the payment of alimony was applied for until June 23th, 1924, at which time appellee was ordered to pay \$250.00 per month.

The record further discloses that on March 9th, 1927, cause was stricken from the docket, and was reinstated on October 3rd, 1927. No order for increase in alimony was asked for until November 18, 1927. On November 16th, 1927, appellant served notice that on November 18th, 1927, she would ask, not for

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a hearing or disposition of her bill for separate maintenance, but for \$500.00 per month temporary alimony, and \$1000.00 solicitor's fees; that before serving this notice for increase of alimony, counsel for appellant, wrote appellee that appellant wanted a divorce; that such counsel would like a conference on the adjustment of property rights, and that appellant's terms were \$500 per month.

It will be noted that it was not until after the notice for increase in alimony had been served on appellee, and the letter from opposing counsel had been received, that appellee filed his cross bill.

Furthermore, under the rule, all that the appellant was required to allege in her original bill, if the same was brought in good faith, was that appellee had, without just cause, deserted her, and that she, without fault on her part, was living separate and apart from him.

Instead of thus pleading, she filed a bill of scandalous and impertinent matter to which exceptions were filed and sustained, of which ruling she makes no complaint.

We are of the opinion that the filing of her bill for separate maintenance was not so much on account of her desire to obtain an allowance by way of separate maintenance, as it was her desire to injury appellee, and to subject him to scandal and ridicule in the community where he was known. In view of the facts as we understand them, the chancellor who heard the cause, was justified in finding appellants suit was not brought in good faith.

The case of *Waltenhof vs Waltenhof*, 44 Ill. App. 135, is relied upon by appellant in support of her contention that in the absence of the wife from appellee pending the adjudication of the separate maintenance proceeding, cannot constitute a basis of appellee's charges as set forth in this cross bill. In this cause the court merely held that a husband, having filed on September 22, 1883, a bill for divorce, which

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was dismissed on hearing, on November 19, 1884, could not in a bill filed October 5th, 1886, less than two years after the first bill was dismissed, urge that there was any desertion, while his first bill was pending; the court saying there could be no presumption that during the pendency of the first suit, he would have received her had she returned, and that it was not incumbent upon a husband or a wife to resume the marital relations and duties while a suit for divorce is in progress. The rule is, that in order that the action by a wife for a divorce, prevent her separation from him constituting desertion, her action must have been begun in good faith and there is no presumption that she acted in good faith, where there was no foundation for her action.

In *Fusel v. Kusel*, 147 Cal. 52, 81 Pac. Reporter 297, 298, the Court said: "The proposition contended for by the defendant is that it is not desertion for one spouse to live apart from the other while an action for a divorce is pending between them. This proposition cannot be sustained in the broad sense in which it is made. It may be admitted, for the purposes of the case only, that where a wife, in good faith begins an action for a divorce against the husband, and immediately separates herself from him, for the reason that it would not be proper for her to live with him while she was prosecuting an action for divorce against him, such separation will not constitute desertion within the meaning of the law, although in fact the suit was unfounded. But on the other hand, it will not be contended, that a wife who intends to desert her husband can, with that intent, leave his residence and live separate from him, and at the same time destroy the effect of the desertion by immediately beginning an unfounded action for divorce against him. The action must be begun in good faith in order to have the effect contended for. Under the facts found in this case, there can be no presumption that the wife acted in good faith. She has the

burden of proving that fact. The court expressly finds that there was no foundation for the action; that there had been no extreme cruelty inflicted by him upon her.*** We cannot, under the particular facts found, assume that the suit of the defendant against the plaintiff for divorce on the day she left him, was begun in good faith. The finding that no such cruelty existed although it may not exclude the possibility of the suit having been begun in good faith, would at least destroy any presumption to that effect. In the absence of good faith, it is clear that the beginning of the action cannot transform a causeless abandonment of the marital domicile into an innocent absence, or into a separation, brought about through the fault of the husband. The subsequent action for maintenance could have no effect whatever upon the running of the statutory period of one year necessary to make the wife's desertion a cause of divorce. It implies a belief on her part that he had deserted her. That being the case, there was no impropriety in her returning to him and offering to again live with him. If he accepted the offer, there would be no necessity for the suit. If her belief was a mistaken one, and she was herself the deserting party, her action for maintenance would not excuse or give an innocent character to her continued absence.

In *VonBernuth v. VonBernuth*, 76 N.J. Equity 487, 74 Atl. 700, 703, the Court said:-

"It is manifest that some portion of the time relied upon by the husband for the accrual of his cause of action was occupied and taken up by the original suit brought by the wife, that is, from October 5, 1908, the day of the filing of her petition, to March 20, 1909, the day on which the husband had a right to file an independent petition. It was so held in *Weigel v. Weigel*, 63 N.J. Eq. 627, 52 Atl. 1123, affirmed 65 N.J. Eq. 398, 54 Atl. 1125, and in *Johnson v. Johnson*, 65 N.J. Eq. 606, 56 Atl. 708. If this rule were applied to this case, there

would be a considerable reduction from the time during which the husband's cause of action was in process of maturing and his cross-petition would have been prematurely filed. There are many cases to this effect, most of which are collected by Vice Chancellor Gray in the Weigel Case. There is however, an exception to this rule which the Vice Chancellor comments upon in the Weigel Case within which the case at bar clearly comes, and that is that the petitioner cannot insist upon the enforcement of the rule in a case in which it appears to the court that his or her original petition was filed and prosecuted in bad faith. In the present case the wife, in the most formal and solemn manner formulated charges of matrimonial offenses against her husband, which were sufficient, if true, to have led to his indictment and punishment by the criminal courts. These were repeated and enlarged upon, in her amended petition, and again referred to less virulently in the replication to the cross-petition. One would naturally expect that some attempt would have been made to substantiate these charges, but at the hearing she not only abandons her own attack, but declines to produce any evidence by way of defense against the attack of her husband. These facts show that the petition of the wife was filed and prosecuted in bad faith, and that she ought not to be allowed to set up her own delinquencies in bar of her husband's right."

In view of the state of the record we are not prepared to say that the court was in error in adjudicating upon the facts in evidence, relative to the original bill, although it was dismissed for want of equity.

It will be remembered that the hearing was had on the bill, cross-bill and petition for increase in alimony, all at one time. In view of the hearing had on the bill, cross-bill and petition for increase in alimony we are of the opinion that the court did not err in admitting evidence of facts subsequent to the separation of the parties as is contended for by appellant. The evidence complained of, if, for no other reason, was competent on the petition for increase in alimony.

The chancellor saw and heard the witnesses who testified in this cause. The rule is that when the chancellor sees the witnesses and hears them testify and the evidence is conflicting, the decree entered by him will not be disturbed upon a question of fact by an appellate tribunal unless it appears that the findings of fact are clearly and palpably wrong. *Columbia Theatre Amusement Co., vs Adsit*, 211 Ill. 122-125.

After an examination of the record we are of the opinion that the decree of the Circuit Court of Lake County should be affirmed, which is accordingly done.

Decree affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

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| THE PEOPLE OF THE | : | |
| STATE OF ILLINOIS | : | |
| EX REL. LISETTA BIRD, | : | |
| APPELLEE | : | |
| | : | APPEAL FROM THE COUNTY |
| vs. | : | COURT OF PUTNAM COUNTY. |
| | : | |
| CHARLES TYLER, JR. | : | |
| APPELLANT. | : | |

Jett, J.

This is a prosecution brought under the bastardy act in the name of the people of the State of Illinois, on the relation of Lisetta Bird, in which she, the said Lisetta Bird, in her complaint filed June 19, 1926, charged Charles Tyler, Jr. the appellant, with being the father of her bastard child.

To the complaint, the appellant entered a plea of not guilty. A jury trial was had on July 20th, 1926, and the appellant was found to be the father of the child of Lisetta Bird. An appeal was prosecuted to this court, and the judgment was reversed and the cause remanded on account of erroneous instructions given on the part of the people. (People vs. Tyler, 243 Ill. App. 637). A remanding order was filed and another trial had on February 7th, 1928.

On the second trial the jury returned a verdict finding the appellant guilty of being the father of the child to which Lisetta Bird had given birth.

A motion for a new trial was entered, denied and judgment rendered on the verdict, for the sum of \$1100.00, being \$200.00 for the first year after the birth of the child, which was born May 16, 1926, and \$100.00 for each year for nine years after said first year, the payments to be made as follows: \$300.00 May 16th, 1928, and \$25.00 on the 16th of August, November, February and May of each year after May 16, 1928. Appellant prosecutes this appeal.

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT
5300 S. DICKINSON AVE.
CHICAGO, ILL. 60637

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It will not be necessary to make a detailed statement of the facts at this time, as one will be found in the opinion previously filed in this case.

It is first insisted that the verdict of the jury is against the manifest weight of the evidence. In our former opinion we did not discuss the evidence at any length, or express any view of its weight. The reversal was not upon the insufficiency of the evidence. Two juries have passed upon the questions of fact involved in this proceeding. They found against appellant in each instance.

We have investigated the record and we are not prepared to say that the jury was not authorized to return the verdict they did, by which they found the appellant to be the father of the child in question.

It is also urged that the State's Attorney, in his argument to the jury, made prejudicial remarks. We have examined the remarks complained of, and we do not believe that the appellant was prejudiced thereby.

Criticism is made of the people's instructions Nos. 3 and 6. These instructions substantially comply with the view we expressed in our former opinion, and we are now of the opinion that the case is without substantial error, and should be affirmed. The judgment of the County Court of Putnam County will therefore be affirmed.

Judgment affirmed.

It is a very old and well known fact that

the first of the world's great religions

was founded in the East

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof.
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

251-34.625

BE IT REMEMBERED, that afterwards, to-wit: On

M.R. the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

GENERAL NUMBER 7954.

Agenda 21.

DAVIS-WATKINS DAIRYMAN'S
MANUFACTURING COMPANY,
A CORPORATION.

APPELLANT

VS.

WILLIAM OHLHAVER COMPANY,
A CORPORATION.

APPELLEE

AT TRIAL FROM CITY COURT
OF AURORA, KANE
COUNTY.

Jett, J.

This suit was instituted by Davis-Watkins Dairyman's Manufacturing Company, appellant, in the City Court of the City of Aurora, in Kane County, against William Ohlhaber Company, appellee, to recover for three sixty-quart Progress, Direct Expansion, Motor driven ice cream freezers, that were sold by the appellant to the appellee. A trial was had by the court without the intervention of a jury; judgment was rendered in favor of appellant, plaintiff below, for \$908.30, and this appeal is prosecuted by appellant because it insists that said judgment is for too small an amount.

For the purpose of this opinion we will call appellant plaintiff, and appellee, defendant. The suit was originally brought on an open account, the plaintiff claiming to be due it \$1245.81, but on the trial of the cause the amount sued for was increased 1,000.00, representing three notes due and unpaid, making the total amount sued for by the plaintiff, \$2245.81.

This suit is one in assumpsit and the declaration consists of a number of counts. To the declaration the defendant pleaded the general issue, with notice of special matters in defense. The special matters of defense relied upon are, (1) that the order and contract entered into by the plaintiff and defendant, provides that the ice cream freezers should be

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installed and put in operation by the plaintiff, that the freezers were never properly or correctly installed, and that as a result of the failure to properly and correctly install the freezers, the defendant was put to a loss of several hundred dollars by way of mechanical labor, same being the money paid by the defendant on the order of the plaintiff, to the mechanics selected by plaintiff to install the freezers; (2), that the contract provides that the plaintiff should have charge of installing and furnishing the mechanics to install the freezers, and that by reason of the failure of the freezers to be correctly and properly installed, the out-put of defendant's factory was so materially decreased during a period of two years that the defendant suffered the loss of large sums of money in the sale of ice cream; (3), with the old equipment, defendant was able to produce a batch of cream in about six minutes, but with the new freezers installed, it was impossible to produce cream in less than thirty to forty-five minutes, to the great loss of the defendant; (4), that by reason of the length of time that it was required to produce the ice cream, by the use of freezers in question, the cream was of an inferior quality, and by reason thereof the defendant was greatly damaged; (5) by reason of the defective erection of said freezers, it required an excessive amount of power to operate, and to operate them at all, it became necessary to shut down other parts of the plant of the defendant while the freezers were being operated, such as making ice and maintaining a sufficiently low temperature in the cold storage room, as a result of which defendant was obliged to and did make large purchases of ice during 1922, 1923, and 1924, sustaining thereby a loss of \$8,500.00 resulting from the defective erection of said freezers; (6), had said freezers been properly erected, the yield of ice cream therefrom would have been twice as much as the raw material used, but by reason of the negligent manner, said mechanic designated by plaintiff, erected said freezers, they could not be made to produce an over plus of more than sixty per cent, and because thereof, defendant was

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greatly damaged. On the trial it was agreed that the items were delivered and that the price was as provided in the contract, and that the three notes, aggregating \$1,000.00 were unpaid.

The question to be determined is whether or not the defendant established its right to recoupement? The principal contention of the plaintiff is that the court improperly construed the contract under which the ice cream freezers in question were purchased from the plaintiff by the defendant; that the evidence is insufficient to sustain a set-off or recoupment, and that the court erred in holding propositions of law on the part of the defendant.

The part of the contract over which the controversy arises is as follows:- "When informed by seller of their need, purchaser will promptly furnish power and all connections for and with power, milk, heat, steam, water and sewer to said machinery and all fittings, appliances, attachments, structures and preparations necessary to erect, set and operate said machinery at purchasers cost; and when such are ready, purchaser will employ, when needed, a mechanic, designated by seller to direct the erection of said machinery, at \$12.00 per eight hour day, and traveling and living expenses, payable to said mechanic weekly. Within five days after seller notifies purchaser that said machinery is ready to operate, purchaser will pay seller balance due, as per terms thereon."

The plaintiff insists that the mechanic who erected and installed the freezers, was defendant's servant, even though he was designated by the plaintiff, and that plaintiff, was therefore, not liable for damages or loss sustained by the defendant on account of his failure to erect or install the freezers in a proper and workmanlike manner.

The record discloses that the plaintiff, not only reserved in the contract itself, the authority of designating and choosing the erecting mechanic, but insisted that the job required a responsible mechanic, and unless he was furnished

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from its engineering department, results could not be guaranteed. So far as disclosed by the record, the defendant, not only had no power of selecting the mechanic, but no supervision or control over details of the work.

It seems to be the idea of the plaintiff that whether or not the mechanic operated efficiently, was immaterial. This contention is contrary to the provisions of the contract, in which it is provided that "within five days after seller notifies purchaser that machinery is ready to operate, the purchaser will pay balance due, as per terms herein," and also that when informed by the seller of its need, the purchaser would promptly furnish power, fittings, attachments, and everything necessary to erect, set and operate said machinery. We think that under the provisions of the contract, it was clearly contemplated that the freezers were not only to be erected and installed, but were to actually operate, and of course that necessarily includes proper and efficient operation.

Not only the wording of the contract itself, but the construction, as the evidence shows, placed upon the agreement by the parties themselves, constituted the erecting mechanic the servant of the plaintiff, for whose acts it was responsible.

Is the evidence sufficient to sustain the recoupment allowed the defendant? Although the defendant had been in the business of manufacturing ice cream, for many years, and had built up a large trade amounting to one hundred thousand dollars, gross, per year, its freezers were operated by means of what is known as the brine system, and it was desirous of installing the most efficient machinery to increase its out-put.

On January 31, 1922, defendant entered into the contract in question, to purchase three of plaintiff's freezers, and pursuant to the right reserved in the agreement, plaintiff selected and designated a mechanic to erect and install them, who entered upon the erecting shortly after they were delivered.

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From that time until the month of August, 1922, a period of almost six months, the mechanic was on the job, trying to erect and connect them so they would run efficiently; for this time and labor at \$12.00 per day, the defendant paid a total of \$1337.52, upon orders issued from time to time, by the plaintiff. Notwithstanding the great length of time expended, neither the original mechanic nor others sent to the factory of defendant, by plaintiff, could make the freezers operate with any degree of success. They required from fifteen minutes to an hour to freeze a batch of raw material, the time increasing with each batch, as a consequence the ice cream was spongy and was of an inferior quality.

Furthermore, it required more power to operate the new freezers, and it was necessary while they were being run, to shut down defendant's ice making machinery and cold storage room. Before the freezers were put in its factory operated as a unit, and its brine freezers only required about seven minutes to produce ice cream. This condition continued until the year 1924, and despite the frequent demands of the defendant of the plaintiff that it take the freezers out, and restore defendant's old ones, such demands were met with promises to make them run right. In 1924, after all efforts, and loss of time and money, an engineer happened along and inspected the "hook-up" of the freezers ~~were~~, and discovered that the ammonia was not being properly converted into vapor because of a trap in the pipes by which the freezers were connected to the compressors. All that he had to do was to remove the trap, then the trouble disappeared; the freezers operated perfectly, producing good ice cream in six minutes.

After an examination of the record we have reached the conclusion that the freezers did not operate as efficiently as they should, and that they caused the defendant considerable loss and damage; that the record also discloses that the reason for the inefficiency of the freezers was due to defective workmanship

in their installation; that the contract of sale provided that when the machines were ready to be installed, the purchaser would cause a mechanic of plaintiff's selection to superintend the work. This part of the contract was complied with. Plaintiff sent a man to the defendant, and in his work in installing the freezers, he inefficiently and unskillfully permitted the bend or curve to exist in the ammonia pipe; the effect was to create a trap in the pipe, and this retarded the freezing solution to such an extent that it took much more time than was ordinarily necessary to manufacture ice cream. The defect was discovered and remedied; thereafter the machines worked with proper efficiency.

In conclusion, we are of the opinion that the court's holdings on the propositions of law, were accurate, and that the recoupment he allowed was just and fair.

Therefore the judgment of the City Court of Aurora will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 2nd day of March in the year of our Lord one thousand nine hundred and twenty and

Justus L. Johnson
Clerk of the Appellate Court

1a

25 J. A. 625²

General No. 8229

Agenda No. 22

APRIL TERM, A. D. 1928

Clara L. Janssen, Appellee.

vs.

H. Fred Janssen, Appellant.

~~Appeal from Sangamon.~~

NIEHAUS PJ.

In this case an appeal is prosecuted from judgment rendered in the circuit court of Sangamon county in favor of the appellee, Clara L. Janssen, against the appellant, H. Fred Janssen, for the sum of \$2896.20. The question presented for review is the legal propriety of the court's action in rendering the judgment. And it is insisted by the appellant, that the appellee had no legal right to recovery upon the promissory note which is the basis of the suit, because the same note was involved in a previous suit between the parties and was a part of the judgment rendered therein against the appellant. The judgment referred to was affirmed by this court on appeal. **Janssen v. Janssen** 235 Ill. App. 630. But it is apparent, from the record in this case; and from the opinion of this court in the case affirmed, that the note here involved was not included in the previous judgment rendered against the appellant. The opinion in the previous case is clear on this

point. And it sets forth the matters involved in that case as follows:

"This suit in assumpsit was commenced in the Circuit Court of Sangamon county by the appellee Clara L. Janssen against her husband, H. Fred Janssen, the appellant. A recovery is sought on three promissory notes by the appellant, and delivered to the appellee, which are dated December 9, 1918. The notes are payable to the order of the appellee; one note for \$1000.00 is payable six months after date; another note for \$1000.00 is payable eighteen months after date; and one note for two thousand dollars is payable two years and six months after date. All the notes draw interest at the rate of five per cent per annum payable semi-annually. The defense of the appellant is embodied in a special plea, which alleges that the notes were given to the appellee without any good or valuable consideration; that the notes referred to were given to the appellee at her request after her return from divers sanitariums and hospitals, kept and maintained for the treatment of persons suffering from insanity, and mental and nervous disorders, where the appellee had recently before that time been under treatment for such mental and nervous disorders, and from which, in the judgment of appellant, she was still suffering, and had not fully recovered; and the appellant in an endeavor to alleviate her suffering and better her physical, nervous and mental condition, and believing, that the giving of said notes, would so alleviate her said suffering, and better her physical, nervous and mental condition gave the same to the appellee. A trial by jury resulted in a verdict for the appellee, fixing her damages at \$2425.00."

And in this state of the record, it was not error for the trial court to refuse to hold the propositions of law requested by the appellant; and the judgment herein was properly rendered against the appellant.

The judgment is affirmed.

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General No. 8232

Agenda No. 25

APRIL TERM, A. D. 1928

A. E. Satterlee, Administrator of the Estate of Kathryn E. Satterlee, Deceased, Appellant.

vs.

Chicago & Eastern Illinois Railway Company,
Appellee.

Appeal from Montgomery.

NIEHAUS, PJ.

This suit was brought against the Chicago & Eastern Illinois Railway Company, the appellee herein, in the circuit court of Montgomery county, by the appellant, A. E. Satterlee, as administrator of the Estate of Kathryn E. Satterlee, deceased, for the benefit of the next of kin of the deceased, to recover damages for the pecuniary loss alleged to have been suffered by the next of kin in the death of the deceased, caused by the alleged wrongful acts of the appellee's employees in the operation of one of its passenger train.

The record discloses, that the deceased was killed in a collision of an automobile in which she was riding with a passenger train of the appellee on the Costa crossing located near the corporate limits of the village of Coalton on December 28, 1925. The evidence shows that the deceased, Kathryn E. Satterlee, a girl about 14 years of age, was riding in a Ford touring car, which was driven by her sister-in-law, Anne Eliza Satterlee, along the public highway toward the crossing in

question; and that as the car reached the crossing in the afternoon of the day mentioned, it was going at a slow rate of speed; but it did not stop or pause as it approached the crossing; and as the car reached the crossing the fast passenger train of the appellee, running on the west bound track of the railroad struck the Ford touring car and resulted in the death of the deceased.

There was a trial by jury; at the close of all the evidence on motion of the appellee, the court directed the jury to find the appellee not guilty. This action of the court is assigned as error, and constitutes the only question presented for review.

Appellant's declaration in the first count, charges general negligence in the operation of the train in question. In the second count, it charges that the appellee was guilty of negligence in the operation of the train because of "obstructions caused by other locomotive engines and cars then and there on the tracks and at and near the crossing aforesaid, and by reason of certain large telegraph poles with numerous arms placed thereon at and near the ground, on which cross arms were large cables and guys, and by reason of a certain hedge fence permitted by the appellee to grow upon the west boundary line of its right

of way, and by reason of a certain turn or bend of said railroad and tracks south of said highway, and by reason of the fact that the said railroad at a certain distance south of said crossing was situated on a grade four feet in height above the level of the ground, that persons approaching said crossing could not see the approach of appellee's passenger train." The third count charges, that the appellee was running its trains "without maintaining on said locomotive any person or persons in a position to observe persons approaching said crossing from the west." The fourth count charges, "that it became and was the duty of the appellee to the public and to the deceased, if it left said crossing open for traffic without a flag man and without gates, not to wilfully and wantonly operate its said engine across said crossing at an unreasonable rate of speed; and that it further became and was the duty of the appellee not to wilfully and wantonly cause its locomotive engine to approach said crossing, without maintaining thereon a person or persons in position to observe persons approaching said crossing from the west, and it further became the duty of the appellee not to wilfully and wantonly strike its locomotive engine against any person or persons going upon said crossing, yet the appellee disregarding his duty in that behalf, did wil-

fully and wantonly by its servants negligently wilfully and wantonly operate said locomotive engine across said public highway in a northwesterly direction at a high unreasonable and dangerous rate of speed, to-wit 75 miles an hour, and did then and there wilfully and wantonly fail and refuse to maintain on said engine a person or persons in position to observe persons approaching said crossing from the west, and without maintaining a flagman or gates for the safety of persons approaching or going upon said crossing from the west."

There are no facts averred in the declaration from which wilfullness of wantonness in causing the collision of the train with the touring car in question, could be inferred; and there is no evidence in the record which tends to show that the appellee's servants in charge of the running of the train in question were operating the train wilfully or wantonly to cause the train to collide with the touring car. **Burns v. Chicago & Alton R. R. Co.** 229 Ill. App. 170. It is true, that the appellee was operating the train without 'maintaining on the locomotive engine, a person or persons in position to observe persons approaching the crossing in question from the west;' and without maintaining a flagman or gate at the crossing; but no such legal duty rested upon the appellee to do so; and the failure to do so therefore did not give the appellant a right to

recover on that ground. **Opp v. Pryor** 194 Ill. 538; **Village of Atwood v. C. I. & W. R. R. Co.** 311 Ill. 425; **Commerce Com. v. Omphigent Township** 326 Ill. 65; **C. & A. R. R. Co. v. Sanders** 55 Ill. App. 87; **C. B. & Q. R. R. Co. v. Manay** 55 Ill. App. 588.

None of the matters charged as negligence in the second count considered separately or altogether constituted a legal ground for recovery against the appellee. **C. & A. R. R. Co. v. Pearson** 184 Ill. 386; **Williams v. Penn. R. R. Co.** 235 Ill. App. 49.

The rate of speed at which the evidence shows the train in question, (so-called 'fast passenger train,') was running, namely 65 miles an hour, was obviously not unreasonable or excessive, inasmuch as the crossing in question was outside of the corporate limits of the village of Coalton; and there was no regulation of the Illinois Commerce Commission, limiting the speed of trains at the crossing in question. The running of the train at the rate of speed referred to at the crossing under these circumstances cannot be considered negligence. It was not the appellee's duty, or the duty of its servants in charge of the operation of the train, to stop the train or slow it down before reaching the crossing; nor to look out for the safety of travelers along the public highway; but the duty to

exercise due care rests upon all persons traveling along the public highway when approaching a railroad crossing; and in the exercise of that care to stop, look and listen for approaching trains. **Newell v. C. C. & St. L. R'y Co.** 261 Ill. 505; **Williams v. Penn R. R. Co.** *supra*. There is no evidence in the record which tends to show a breach of any duty to the public or to the deceased by the appellee or its servants in the operation of the passenger train across the crossing in question. And hence there is no legal ground for recovery shown by the evidence. The court therefore properly directed the jury to find the appellee not guilty. Judgment is affirmed.

Judgment affirmed.



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FEB 1 1929

Richard Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A.D. 1928.

TERM NO. 2. 3.

AGENDA NO. 7.

GEORGE W. LUDWIG,
Appellee,

VS.

ELLA E. BURGESS, et al,
Appellant.:
:
:
:251 I.A. 625⁴

APPEAL FROM THE CIRCUIT

COURT OF FRANKLIN COUNTY.

BARRY, P. J.

Appellee filed a bill to foreclose a certain mortgage for \$2500.00 dated April 26, 1924, and falling due in three years from date with interest at 7% per annum, payable semiannually. The note and mortgage were executed to the Benton State Bank and the note was endorsed to appellee without recourse. At the time of the execution of the note and mortgage Quincy E. Burgess, Jr., a minor, owned an undivided one-fifth (1/5) interest in the land and the bill avers that the guardian of said minor filed a petition in the County Court for leave to mortgage the interest of said minor and that the said county court entered an order granting such leave and the guardian joined in the said mortgage.

The defendants to the bill filed a plea to the jurisdiction of the court averring that the mortgage could not be foreclosed except in the county court, etc. Appellants contend that the court erred in not sustaining that plea. The abstract does not show that appellants asked that the plea be set down for hearing or that the court ruled thereon. It is admitted, however, that the court held that the mortgage was invalid and void as to the said minor and the bill of complaint was for that reason dismissed as

to the minor. There is nothing, therefore in the contention that the plea to the jurisdiction was a bar to the action. The abstract shows that the defendants to the bill filed an answer without asking the court to determine the sufficiency of the plea.

Appellants contend that as the coupon note for the interest was not endorsed the decree should not have included the amount of that note, \$87.50. We are of the opinion that the endorsement of the principal note carried with it the note for the interest which was unpaid.

Appellants insist that as there was nothing said in the bill about the allowance of a solicitor's fee for the foreclosure of the mortgage and no proof was offered as to the reasonableness of the fee, the court erred in allowing a solicitor's fee of \$200.00. They say that the mortgage provides for a reasonable solicitor's fee and that before the court could make any allowance in that regard the bill should ask for it and the proof should show that the fee allowed was reasonable.

The abstract does not show the provision of the mortgage as to the allowance of a solicitor's fee. The mortgage was made a part of the bill of complaint and the bill prays that an account may be taken by or under the direction of the court and that the defendants be decreed to pay the complainant whatever sum shall appear to be due him upon the taking of said account, etc. Under such a bill, we have held that a solicitor's fee may be allowed the complainant without a specific request for such allowance; *Dates vs. Winstanley*, 53 App. 623; *Burke vs. Donovan*, 60 App. 241-247; *Knight vs. Heafer*, 79 App. 375.

The abstract must be sufficient to present every error relied upon as the court will not search the record to find errors not disclosed by the abstract; *People vs. Paul*, 167 App. 557; *People vs. Armour*, 307 Ill. 234.

The rulings of the trial court are presumed to be according to the law and the evidence and litigants contending that error has been committed should make the error appear in the abstract. In the case at bar the abstract does not set out the provision of the mortgage pertaining to the allowance of solicitors fees. In the absence of such a showing the court will presume that the mortgage contains a provision fixing the solicitor's fee at the amount determined by the court. Where a specific amount is provided for it is unnecessary to produce further evidence as to its reasonableness, Dorn vs. Ross, 177 Ill. 225.

Appellants contend that the decree is contrary to the evidence. After this loan was arranged for and before the money was paid over the Logan State Bank procured a judgment by confession against Ella E. Burgess for \$3,002.90 and costs of suit. That judgment was assigned to appellee. Mrs. Burgess then executed another note and mortgage to the Benton State Bank for \$2800.00 which was endorsed to Gustave Ludwig. It took all of the \$2500.00 mortgage and a part of the \$2800.00 mortgage to satisfy the judgment of the Logan State Bank against Mrs. Burgess. She testified when she got the check for the balance of the \$2800.00 mortgage she knew that the rest of the money had been paid on that judgment. That matter was adjusted in June 1924 and she afterwards paid the interest on both loans for two and a half years and at the time of the filing of this suit she had not paid the last semi-annual interest coupon on each of the loans. We are of the opinion that at the time of the closing of these loans she knew and understood that the judgment taken by the Logan State Bank was to be paid out of these loans. We would not be warranted in holding that the decree is contrary to the law and the evidence.

The same questions were raised in Gustave Ludwig vs. Ella E. Burgess, et al. Term No. 3. Ag. No. 8. For the reasons above stated the decree in each of these cases is affirmed.

AFFIRMED.

Not to be reported in full.



FILED

FEB 1 1929

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

OCTOBER TERM, A. D. 1928.

TERM NO. 7.

AGENDA NO. 22.

251 I.A. 626¹

BERTHA DRESSEL, et al,
Appellants,

VS.

L. R. MC KINLEY,
Appellee.

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: APPEAL FROM THE CIRCUIT
:
: COURT OF ST. CLAIR COUNTY.
:

BARRY, P. J.- Appellants filed a bill to restrain the erection of a certain building on the property of appellee. They say that they contended in the trial court that appellee was violating an ordinance of the City of Belleville which prohibits the erection of wooden or frame buildings within the fire limits. The court entered a decree dismissing the bill for want of equity.

Appellants contend that in the erection of the building appellee was violating that portion of the ordinance which is in substance: - That any wooden structure exceeding ten feet deep, ten feet long and ten feet high cannot be constructed, enlarged, or placed within the fire limits of said city if it is either of wood or frame construction, except, however that a frame or wooden structure covered with corrugated iron, stucco or like material and roofed with rubberoid or other fire-proof roofing of a size not to exceed twelve feet deep, fourteen feet long and twelve feet high may be erected, if the material and construction of said structure are approved by the fire warden. It is apparent that the portion of the ordinance relied

upon pertains to the erection of a building within the fire limits of the city. Appellants neither averred nor proved that the lot upon which appellee was erecting the building was within the fire limits. Neither is there averment nor proof that the City of Belleville had established fire limits. The burden was upon appellants to show that appellee was erecting a building within the fire limits which was prohibited by the ordinance in question. In the state of the record the court did not err in dismissing the bill for want of equity and the decree is affirmed.

A F F I R M E D.

Not to be reported in full.

FILED

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

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251 I.A. 626²
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILL.

OCTOBER TERM, A. D. 1928.

TERM NO. 16.

AGENDA NO. 1.

GEORGE ALBRECHT, et al, :
Plaintiffs in Error, : ERROR TO THE CIRCUIT
VS. :
AUGUST LOHSE, et al, : COURT OF MADISON COUNTY.
Defendant in Error. :

BARRY, P. J.

Plaintiffs in error filed a declaration in assumpsit against defendants in error in which they averred that they were the owners of a tract of timber land in Madison county and had entered into a contract with defendant in error August Lohse, who was the owner of a circular saw and saw-mill apparatus, and that in and by said contract the said Lohse agreed to saw into various lengths all the timber on said land for a certain consideration; that Nichols Shepard Company, the other defendant in error, was the primary cause of the said Lohse refusing to carry out his said contract because of certain slanderous statements which the said Nichols Shepard Company made against the plaintiffs in error, and each of them, to the said Lohse, therein stating that they, the plaintiffs in error, and each of them, were not responsible parties, thereby meaning to say that they and each of them could not be trusted; that by means thereof the said Lohse failed and refused to saw the said timber as he had, in his said agreement, agreed to do, and thereby plaintiffs in error suffered the loss of certain profits, to their damage in the sum of \$750.00, etc.

A demurrer was interposed on the ground that

an alleged cause of action based upon tort is joined with one based on contract; that the declaration is bad for duplicity; that the averments are vague, indefinite and uncertain and that the declaration does not state a joint cause of action against the defendants in error. The Court sustained the demurrer and plaintiffs in error having elected to stand by their demurrer, judgment was rendered against them in bar of the action and for costs.

The court did not err in its ruling on the demurrer. The declaration does not state a joint cause of action against the defendants in error. According to the averments Lohse had made a contract with plaintiffs in error which he refused to perform. The other defendant in error was not a party to the contract and in order to recover damages from that party it would be necessary to aver and prove that it had maliciously caused Lohse to breach his contract with plaintiffs in error. The declaration seeks a recovery against Lohse for a breach of contract while the remedy, if any, against Nichols Shepard Company is for the commission of a tort.

If suit had been brought against Nichols Shepard Company, alone, the averments of the declaration would be wholly insufficient. In such an action it would be necessary to aver and prove that the Nichols Shepard Company maliciously interfered with an existing contract between Lohse and plaintiffs in error. Malice, in its legal sense, means a wrongful act done intentionally, without just cause or excuse; the willful violation of a known right, *London Guarantee Co., vs. Horn*, 206 Ill. 493. To render one liable for preventing the performance of a contract he must have had knowledge of it, *McCurke vs. Cronenwett*, 199 Mass. 257, 19 L. R. A. (N.S.) 561. It is very generally recognized that there are many circumstances where, if one honestly gives a



an alleged cause of action based upon tort is joined with one based on contract; that the declaration is bad for duplicity; that the averments are vague, indefinite and uncertain and that the declaration does not state a joint cause of action against the defendants in error. The Court sustained the demurrer and plaintiffs in error having elected to stand by their demurrer, judgment was rendered against them in bar of the action and for costs.

The court did not err in its ruling on the demurrer. The declaration does not state a joint cause of action against the defendants in error. According to the averments Lohse had made a contract with plaintiffs in error which he refused to perform. The other defendant in error was not a party to the contract and in order to recover damages from that party it would be necessary to aver and prove that it had maliciously caused Lohse to breach his contract with plaintiffs in error. The declaration seeks a recovery against Lohse for a breach of contract while the remedy, if any, against Nichols Shepard Company is for the commission of a tort.

If suit had been brought against Nichols Shepard Company, alone, the averments of the declaration would be wholly insufficient. In such an action it would be necessary to aver and prove that the Nichols Shepard Company maliciously interfered with an existing contract between Lohse and plaintiffs in error. Malice, in its legal sense, means a wrongful act done intentionally, without just cause or excuse; the willful violation of a known right, *London Guarantee Co., vs. Horn*, 206 Ill. 493. To render one liable for preventing the performance of a contract he must have had knowledge of it, *McCurke vs. Cronenwett*, 199 Mass. 257, 19 L. R. A. (N.S.) 561. It is very generally recognized that there are many circumstances where, if one honestly gives a

party to a contract advice which, if followed, will necessarily cause a breach of contract, or in other ways, in good faith, induces a breach of a contract to which he is not a party, he does not render himself liable therefor, 15 R. C. L. 57.

The Court properly sustained the demurrer and rendered judgment in favor of defendants in error. The judgment is affirmed.

AFFIRMED.

Not to be reported in full.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT.

OCTOBER TERM, A. D. 1928.

FILED

1928

ROBERT S. ROSE
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILL.

TERM NO. 17.

AGENDA NO. 16.

N. C. Gochenour, Trustee, etc., :
Appellee, :

: APPEAL FROM THE CIRCUIT

VS.

: COURT OF FAYETTE COUNTY.

The Farmers and Merchants State
Bank, et al., Appellants. :

BARRY, P. J.-

Henry A. Gorken was adjudged a bankrupt on April 21, 1926. Appellee was appointed trustee in bankruptcy and filed this suit to recover a preference. The bill was framed with a double aspect; to recover ten shares of the capital stock of the Farmers and Merchants State Bank alleged to have been received by said bank through its president from the bankrupt on January 11, 1926, as collateral security for an existing debt then owing by the said bankrupt to said bank; and in the alternative to recover \$1214.56 received by said bank on the day in question as a payment of the said existing indebtedness aforesaid. The cause was heard in open court and a decree rendered to the effect that appellants should deliver to appellee the said capital stock and all dividends declared thereon since the date of the transfer.

The bankrupt was a stockholder, director and vice president of the Farmers and Merchants State Bank on January 11, 1926, and for several years prior thereto. The record discloses that on the date aforesaid his property was worth about \$38,000.00 and his liabilities were more than \$50,000.00. He was indebted to the said bank in the sum of \$4800.00 for several years prior to January 11, 1926 and his



note therefor was renewed from time to time, the interest being paid but the principal remained the same. We find nothing in the record to show that the last renewal note was past due on January 11, 1926.

Appellants contend that the court erred in admitting evidence to the effect that the general reputation of the bankrupt in the community was that of an insolvent person. The evidence in that regard should not have been received, *Ensley vs. First National Bank*, 17 Fed. (2nd) 603; *Coleman vs. Lewis*, 183 Mass. 485, 67 N. E. 603. The cause having been tried before the court the admission of incompetent evidence is not reversible error if there is sufficient competent evidence in the record to support the decree.

The Farmers and Merchants State Bank is located at St. Peter, Illinois, a town of about four hundred inhabitants. For several years prior to the date in question its officers were as follows: - Appellant Henry Gluesenkamp was president; Henry A. Gerken the bankrupt, vice president; W. F. Gluesenkamp, cashier; Oliver Gluesenkamp assistant cashier. The president and cashier are brothers and the assistant cashier is a son of the cashier. A few years prior to January 11, 1926, the bankrupt moved from St. Peter to Vandalia but continued as vice president of the said bank until a few days after the date aforesaid. We will now consider the evidence bearing upon the question as to whether appellants had reasonable cause to believe that at the time of the transfer of the stock in question the bankrupt was insolvent and that the taking of the stock as collateral security for an existing indebtedness would enable the bank to obtain a greater percentage of its claim than other creditors of the same class.

The record discloses that on January 11, 1926, and prior thereto the bankrupt had \$43,000.00 of Hoosier



Rolling Mill stock. The president of the bank says that he knew the bankrupt had a lot of stock and that he didn't know whether he had given notes for it or had paid cash. He says he did not consider the stock worth very much and that he knew the bankrupt was owing \$12,000.00 in 1924. The assistant cashier knew the bankrupt had invested heavily in the stock aforesaid and the witness thought the stock was not worth very much. The bank had carried the bankrupt's note for \$4800.00 without security for several years and considered it good, and the president of the bank says that he knew of no reason why the cashier asked for a mortgage on the bankrupt's land.

The cashier testified that the plan of getting a mortgage from the bankrupt and having him procure a loan of \$1200.00 from the president of the bank to be secured by the assignment of the stock in question as collateral therefor was arranged by himself. He says he did not talk it over with the finance committee that security ought to be required of the bankrupt. On December 29, 1925 he wrote to an abstractor inquiring if the bankrupt had given any mortgages or if any liens or judgments had been filed against him since December 17, 1923, and received a reply that the bankrupt had given a mortgage for \$4,000. on some of his land; that a judgment for \$179.25 had been confessed in February 1925 and another for \$1122.50 on December 8, 1925. On January 4, 1926, the cashier wrote the bankrupt that he had seen the committee that day and they instructed him to get a mortgage on the forty acres of the old home farm which was clear, for \$1250.00, and another mortgage for \$2350.00 on his dwelling in St. Peter, and that he should pay the balance, \$1214.56 in cash; that they had talked the matter over and the bank could not take his bank stock as collateral; that if he could not borrow the money

on the bank stock his brother, Henry Gluesenkamp would loan him \$1200.00 if he would put up the stock as collateral; that he would like to have it in the mortgage that all of the rent from the house in St. Peter should be paid to the bank. The letter closed by asking him to attend to the matter at once. At that time the bankrupt had but \$1.14 on deposit in the appellant bank. The two mortgages were executed by the bankrupt on January 5, 1926, but the date of their delivery does not appear. They were filed for record on January 13, 1926. The bankrupt executed his note for \$1200.00 to the president of the bank on January 5, 1926, and assigned his bank stock as collateral therefor. The note and the bank stock in question were sent to the bank on January 11, 1926. On that day the bankrupt gave the cashier a check for \$1.14, the amount of his deposit, and another check for \$13.42 on a Vandalia bank. The president of the appellant bank gave the bank a check for \$1200.00, the amount of the alleged loan to the bankrupt, without any instructions from the bankrupt. It clearly appears that the cashier and assistant cashier were acting as agents for the bank and its president in the transactions aforesaid.

The president of the bank, in 1924, was aware of the fact that the bankrupt was then indebted in the sum of \$12000.00. So far as the record shows none of that indebtedness had been paid. At the time he took the bank stock as collateral he knew the bankrupt had confessed two judgments, one in February 1925 and the other on December 3, 1925, and that those judgments were unpaid. He also knew the bankrupt had placed a mortgage of \$4,000.00 on some of his land and that he had given the appellant bank other mortgages on his real estate to the amount of \$3600.00. He also knew that his brother-in-law held the bankrupt's note for about \$1300.00.

The abstract of the record in this case shows that the brother-in-law took judgment against the bankrupt on January 9, 1926, for \$1256.00. The brother-in-law testified that he was in the bank a couple of days before he took that judgment and that the cashier said to him "That Henry Gerken, (the bankrupt) was pretty hard up against it and some of them filed claims against him, and that he had better do it too, or else he would be out of it." The cashier does not deny that he made the above statement to his brother-in-law. The abstract shows that the said statement was made a couple of days before January 9, 1926, and prior to the delivery of the assignment of the stock in question. Counsel for appellee say, in their brief and argument, that the judgment aforesaid was taken on January 19, 1926. If such is the fact there is a mistake in the abstract. But even if the conversation between the cashier and his brother-in-law occurred on January 17th instead of January 7th, yet the fact remains that no claims had been filed against the bankrupt except such as were known to the cashier on December 30, 1925. On the knowledge the cashier had on the last mentioned date he advised his brother-in-law, either on January 7th, or January 17th, that the bankrupt was pretty hard up against it and that he had better put in his claim or he would be out of it.

The president could not remember whether he said about a week after the bank took the mortgages, that they took them to get ahead of other creditors. He could not remember whether he said they were safe because they took the mortgages and that other creditors would have to get their money as best they could. These statements appear in the record but were not shown in the abstract. The cashier testified to a conversation he had with the bankrupt in which the latter said he expected to get some money from Finklestein



and that witness told him he could not hope to get any money from that source. Finklestein was in charge of the Hoosier Rolling Mill Company. The conversation referred to was prior to the transfer of the bank stock. The cashier was asked if at the time of that conversation it was not common knowledge in St. Peter that the bankrupt had made so many bad investments that he was slipping and his answer was "not at that time, no, not at that time, no sir not then; it was about the time he took the mortgage and made this loan on the bank shares." That answer is not fully set out in the abstract but appears in the record.

The trial court had the advantage of seeing and hearing the witnesses and in view of the evidence above referred to we would not be warranted in holding that the decree is not supported by competent evidence. The decree is affirmed.

AFFIRMED.

Not to be reported in full.

FILED

FILED

Robert H. Rice
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILL.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1928.

251 I.A. 6264

TERM NO. 25.

AGENDA NO. 28.

S. E. PHELAN,

Appellee,

:

VS.

:

APPEAL FROM THE CIRCUIT

:

COURT OF FRANKLIN COUNTY.

ZWICK MERCANTILE CO.,

Appellant.

:

BARRY, P. J.-

This case was here on a former appeal and the judgment was reversed at the October Term, 1927. Upon a re-trial of the cause appellee recovered a verdict and judgment for \$1653.33. Appellant now contends that the instrument sued on is unilateral and therefore unenforceable. The suit is for the breach of a written contract entered into on October 25, 1924, between appellant as party of the first part, and appellee as party of the second part. The first paragraph provides:- "That second party shall enter into the service of first party as manager of the business of said first party, *** for a period of two years from the third day of November 1924," etc. The sixth paragraph provides:- "The salary of said manager, second party, shall be the sum of \$50.00 per week, payable weekly throughout the period of said two years," etc. The contention that the contract is unilateral is not sound.

It is next insisted that the instrument sued on was given life or vitality by the filing of the bond therein provided for. The contract is set out, in haec verba, in the declaration and contains the following provision:- "Before this agreement shall become effective or binding upon either of the parties hereto, second party shall



file with first party a good and sufficient bond, to be approved by first party, in the sum of \$2,000.00" etc. The contract offered in evidence by appellee contains the same provision. Appellant offered in evidence what purported to be a duplicate of the contract but in the transcript of the record this copy as originally prepared purported to require a bond in the sum of \$5,000.00. A line is drawn through the word "five" and the word "two" is written above the word "five". Appellant filed no verified plea denying the execution of the instrument set out in the declaration and is in no position to contend that the contract sued upon is not the real contract between the parties.

Appellee testified that he executed a bond to appellant in the sum of \$2,000.00 with L. C. Dorris as surety and that he delivered the said bond to the president of appellant before he entered upon his duties under the contract. Mr. Dorris testified that he signed the bond in the sum of \$2,000.00 as surety for appellee at the time the contract was executed. Appellant's president testified that appellee did not file any bond with him. The question as to whether a bond was actually filed was a question of fact for the jury. But whether it was filed or not was not very material as appellant entered upon his duties and continued as manager for a period of fourteen months without objection or a suggestion that he should file a bond. Appellant's conduct in that regard operated as a waiver.

Appellant contends that the first and third instructions given on behalf of appellee were erroneous. Conceding, without deciding, that this contention is sound the giving of the instructions complained of was not reversible error. The jury was in no way misled and the

amount of the verdict is in accordance with the law and the evidence. The contention that the jury disregarded the instructions given on behalf of Appellant requires no further comment.

It is argued that the record discloses a misjoinder of parties defendant. The suit was originally brought against appellant and its president, H. M. Zwick. When the cause was heard on the former appeal the suit had been dismissed as to Mr. Zwick. It clearly appears from the declaration and the contract sued upon that Mr. Zwick was not a party to the contract and that no recovery could have been had against him in this suit. The judgment is against appellant only.

It is finally insisted that the evidence conclusively proves that appellant had just cause for the discharge of appellee. Appellee filed an affidavit of claim with his declaration and appellant filed an affidavit of merits which was signed and sworn to by its president, H. M. Zwick. In that affidavit Mr. Zwick stated that appellee was not in fact discharged by appellant but that he voluntarily left its service. That affidavit was sworn to on December 22, 1926. On the trial of this case Mr. Zwick testified that appellee was discharged on January 8, 1926.

Under the affidavit of merits appellant was not entitled to prove that appellee was discharged. If objection had been made the evidence would have been excluded. The parties went into that question, however, without objection and in the state of the record it is not at all strange that the jury found the issues in favor of appellee. By their verdict the jury simply allowed appellee the amount he would have been entitled to recover under the contract after crediting appellant with what appellee had earned during the remainder of the term. Under the law and the evidence the verdict could not have been otherwise and the judgment is affirmed



FILED

ROBERTO RICO
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILL.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

OCTOBER TERM, A. D. 1928.

TERM NO. 39.

AGENDA NO. 34.

BELLEVILLE BANK AND TRUST
COMPANY, Administrator, etc.,
Appellee,

251 I.A. 626
APPEAL FROM THE CIRCUIT

VS.

COURT OF ST. CLAIR COUNTY.

BIEBEL ROOFING COMPANY, et al, :
Appellant.

BARRY, P. J.

Appellee sued to recover for personal injuries sustained by its intestate, but which did not cause his death, and for the loss of his automobile, alleged to have been occasioned by the negligence of appellants. The declaration charged that appellants permitted their truck to stand on the hard road in such a position that there was not room for two vehicles to pass upon the road and that the said truck was left in said position at a time more than one hour after sunset without displaying a light on the rear of the same, etc. A plea of not guilty was filed and the trial resulted in a verdict and judgment for \$1150. A Mr. Latham was driving his Hudson car, going north on route 13 when he overtook and collided with a horse-drawn vehicle. That accident occurred on the evening of November 3, 1926 between six-thirty and seven o'clock. Soon after that collision occurred appellant's truck approached from the south and stopped a few feet back of the Hudson car. One witness testified that both of the rear wheels of the truck were on the concrete and practically all of the other witness said that the truck stood partly on the slab. In a very short time after the truck stopped appellee's intestate came from the south riding in his car,

which was driven by an agent or servant and his car crashed into the rear end of the truck.

There is a serious conflict in the evidence as to whether there was a light on the rear end of the truck after it stopped on the hard road and before the impact. In the state of the proof negligence and contributory negligence were questions of fact to be determined by the jury and we would not be warranted in holding that the verdict is against the manifest weight of the evidence.

Counsel argue that the court erred in refusing to allow appellant, Nick Biebel, to testify. When the witness was called an objection was made that he was incompetent because of the fact that appellee was suing as administrator. Appellants made no offer as to what they expected to prove. He was not a competent witness for all purposes. Under such circumstances appellants should have stated to the court what they expected to prove and having failed to do so we cannot say there was any error in refusing to allow him to testify, *Stewart v. Kirk*, 69 Ill. 509.

The court gave three instructions on behalf of appellee and sixteen at the request of appellants. The first instruction for appellee is not subject to the criticism urged against it. The second should not have been given and the third may not be strictly accurate. In view of the numerous instructions given on behalf of appellants, covering as they do every phase of the case, we are of the opinion that the jury could not have been misled by appellee's second and third instructions. No reversible error having been pointed out the judgment is

A F F I R M E D.

Not to be reported in full.

FILED

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1928.

ROBERTS, ROY
CLERK OF APPELLATE COURT
FOURTH DISTRICT OF ILL.

FILE NO. 4.

AGENDA NO. 17.

THE PEOPLE OF THE STATE OF ILLINOIS, :
Defendant in Error, :

251 I.A. 627

VS.

SELSO CRUZ, TUREBIO CRUZ, SEDRO CRUZ

and JOHN GARCIA,

Plaintiffs in Error. :

ERROR TO THE CIRCUIT
COURT
OF ST. CLAIR COUNTY.

NEEHALL, J.-

Plaintiff's in error were found guilty of petit larceny in the Circuit Court. The Court imposed a fine and jail sentence, and a reversal is now sought on the sole ground that the record fails to show, beyond a reasonable doubt, that the plaintiffs in error were each guilty of the crime charged in the indictment.

The indictment charged that the plaintiffs in error stole a ham of the value of \$2.00 and \$50.00 in money, the denominations of which were unknown to the grand jurors, and being the personal goods and chattels of one Jennie Ignatz.

The jury rendered a verdict finding each plaintiff in error guilty, as charged in the indictment, and fixed the value of the property stolen at the sum of \$2.00. Motion for a new trial was made and overruled, and the plaintiffs in error, Sedro Cruz and Turebio Cruz, were sentenced to a term of one year in the county jail, and each fined the sum of \$100.00 and costs, and the plaintiffs in error, Sello Cruz and John Garcia, were each sentenced

to a term of nine months in the county jail, and each fined the sum of \$75.00 and costs.

Proof shows that the plaintiffs in error are of Mexican birth, and that they are not familiar with the English language; that they were employed as laborers at the American Zinc Company in the City of Fairmont, St. Clair County; that they completed their daily work at eleven thirty in the forenoon of each day; that they resided within a few blocks of the plant; that on their way home they were accustomed to stop in a soft-drink parlor that was operated by Jennie Ignatz, the prosecuting witness.

This soft drink parlor was conducted in front of a building consisting of three rooms, and the family of the prosecuting witness lived in the rear of the store. Her kitchen was directly in the rear of the store and connected therewith by a door, and there was also a door leading from the kitchen to the back of the store.

For sometime prior to March 28, 1928, Mrs. Ignatz had been accustomed to serving the plaintiffs in error sandwiches and drinks on their way home from work; that on the day plaintiffs in error are alleged to have stolen the property in question, they all appeared at the store at about the same time, and made purchases of various kinds at the store, and were served with several drinks by the prosecuting witness; that, while at the store, the plaintiffs in error were seen going into the kitchen, and from thence out into the back part of the premises, sometimes in groups of two or three, and at other times singly. Proof tends to show that plaintiffs in error were intoxicated at the time they were in the store of the prosecuting witness.

Jennie Ignatz, prosecuting witness, testified on direct examination that, when Turcibio Cruz came into her place of business, he went into the kitchen, and asked for



a comb to comb his hair, and that, as he left the kitchen, he took a ham from the table and walked out; that the witness had some money in a pocket book behind the looking glass above the ice box; that about the time the plaintiffs in error were in her place of business, she missed her pocket book, but was unable to say who had taken it.

On cross-examination, the prosecuting witness testified that she did not see anyone take the ham from the table; that all she knew was that the ham was missing after plaintiffs in error had left her place of business; that plaintiffs in error were not sober when they were at her place of business, that on previous occasions they had frequented her place, and that she was on friendly terms with them; that there were other customers in her place of business besides plaintiffs in error, including a man called the Beebe drummer.

Gus Dashney, witness for the people, testified that he knew the plaintiffs in error by sight; that he came into the store after the plaintiffs were there and bought a package of cigarettes; that he did not pay much attention to the plaintiffs in error, but that he did see one of them in the kitchen; that, when the prosecuting witness stated that her pocket book was missing, he went to get a policeman; that he did not see the plaintiffs in error take any money or property, but that he did see a man called the Beebe drummer in the kitchen.

Jesse McCaslin, witness for the People, testified that he went in the store in question, and while there saw three of the plaintiffs in error; that one of them asked Mrs. Ignatz for comb, but that he was not sure which one it was, and saw one of them combing his hair, but that afterwards he came from the kitchen into the main part of the store; that he saw half of a ham lying on the kitchen table; that

he saw one of the plaintiffs in error pick up the ham, and leave by the back door; that two others followed, but that he did not know which one it was, but that he thought one the men looked like Turebio Cruz; that there were three or four other men in the confectionary when the witness left; that the witness did not say anything to Mrs. Ignatz about the ham being taken at the time he left the store; that he himself left the store for a time and that, when he came back, someone told him that Mrs. Ignatz had missed her pocketbook, and that he then told Mrs. Ignatz that the ham was missing .

Gus Dashney, witness for the people further testified that he was in the kitchen of the prosecuting witness at the time she discovered that her money was gone; that the plaintiffs in error told her, in his presence, that they did not take her money; and that someone called the police.

It appears from the testimony that, when the police arrived, the plaintiffs in error denied taking the money, and offered to permit the police to search them. It does not appear that any search was made, or that the pocket book was ever found.

Each of the plaintiffs in error took the stand, and testified that they did not take either the money or the property Mrs. Ignatz, and denied any knowledge of knowing what became of the money. They all admitted that they had been drinking in the place operated by the prosecuting witness, and that they were more or less drunk, either from drinks served there or from some other source.

By the verdict of the jury, it appears that the jury acquitted the plaintiffs in error of the charge of taking money that was contained in Mrs. Ignatz' pocket



book, for the verdict fixed the value of the property taken at \$2.00, being the proved value of the ham that lay on the kitchen table.

There is no positive testimony by any witness for the state, which would show that any particular plaintiff in error stole the ham in question, but proof as to who was the guilty party is extremely doubtful and uncertain.

It rests entirely upon speculation and guess-work, and, after a careful examination of the testimony contained in the record, we are of the opinion that, after considering all of the evidence, there is a reasonable doubt as to the guilt of each of the plaintiffs in error, and that a conviction ought not to be sustained under such circumstances. (See People v. True, 314 Ill. 89; People v. Koelling, 284 Ill. 118.)

In Campbell v. The People, 16 Ill. 17, it was said:- "Although it may be positively proven that one of two or more persons committed a crime, yet, if it is uncertain which is the guilty party, all must be acquitted. No one can be convicted until it is established that he was the party who committed the offense."

In reading the testimony of the record, it is quite apparent that there is no definite testimony which can be said to show beyond a reasonable doubt that any one of the plaintiffs in error is guilty of the crime charged.

For the reasons aforesaid, the judgment and sentence against each of the plaintiffs in error is hereby reversed, and the cause remanded to the Circuit Court of St. Clair County for a new trial.

JUDGMENT AND SENTENCE REVERSED AND
CAUSE REMANDED FOR A NEW TRIAL.

Not to be reported in full.



STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
OCTOBER TERM, A. D. 1928.

FILED

FEB 1 1929

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 124

AGENDA NO. 11.

E. S. BUNDY and D. W. STULL, :
Defendants in Error, :

VS. :

ERROR TO THE CIRCUIT

COURT OF FRANKLIN COUNTY.

LEO I. D'YER,
Plaintiff in Error. :

NEWHALL, J.

The defendant in error, E. S. Bundy, obtained a judgment by confession against the plaintiff in error in the Circuit Court of Franklin County, on August 10, 1927, during the regular May Term of said Court. Declaration alleges that the defendant in error Bundy on September 4, 1926, made and delivered to one Fred Nave his promissory note of that date payable to the order of said Nave one year after date for the sum of \$1,024.07, with 7% interest after maturity; that Nave by his indorsement thereon transferred the same to plaintiff in error prior to the maturity of the note; that plaintiff in error appointed an attorney in any court of record, in any state, as his attorney to appear for him in any court of record in term time or vacation any time after the date of said note and waive the issuance and service of process, and confess judgment against him for the amount of said note and interest then due, and by such power of attorney agreed to release all errors and waived all appeal in said cause.

On March 5, 1928, the plaintiff in error filed a motion to vacate said judgment and in support thereof filed his affidavit stating that the said note was given by affiant to square one-half of a certain account with the

West End Mill against the firm of Mitchell & Dwyer; that it was given with the understanding it would be held by the payee until such time as certain notes and accounts of the firm of Mitchell & Dwyer could be collected to take care of the note; that affiant has no accurate knowledge of the amount received from said collections, and claims that he is entitled to an accounting; that under proper management such collections should have been realized to pay the major part or all of said note; that contrary to the agreement between affiant and payee of the note, payee assigned the same to defendant in error Bundy.

Defendant in error Bundy filed motion to strike the motion of plaintiff in error from the files and on hearing, defendant in error's motion was allowed, and motion to vacate the judgment denied.

First error argued by plaintiff in error is that the declaration does not state sufficient facts to constitute a cause of action and that under Section 5 of the Negotiable Instrument Act the instrument sued on is non-negotiable.

While a writ of error will lie to review the overruling of a motion to vacate a judgment on a note, it will not lie to review the judgment itself, where the cognovit, filed pursuant to express authority contained in the power of attorney, forming part of a note, expressly waives and releases all errors intervening in the entry of judgment and agrees that no writ of error or appeal shall be prosecuted to reverse the judgment thereon.

(Boyles vs. Chytraus, 175, Ill., 370.)

Even if the declaration were defective, such defect would be a mere error of law which is waived by the provision of the cognovit and the defective declaration is cured by the confession of judgment.



(Caruthers vs. Niblack, 73 Ill., App. 197.)

Section 5 of the Negotiable Instrument Act (Section 25, Chapter 98, Smith & Hurd's 1927 statute) provides that the negotiable character of an instrument otherwise negotiable is not affected by a provision which authorizes a confession of judgment or waives the benefit of any law intended for the advantage or protection of obligator.)

Counsel for plaintiff in error contends that the provision authorizing confession of judgment should be limited to confession of judgment in the county wherein the maker of the note resides, and invokes the provision of Section 6 of the Practice Act in support of this contention. We think there is no merit in this contention as Section 6 of the Practice Act confers a mere privilege which may be waived and is here expressly waived by the terms of the power of attorney in the note.

The only error that is assigned which we could consider here, is whether or not the trial court erred in denying the motion to vacate the judgment by reason of the facts set forth in the affidavit offered in support of the motion to vacate.

A defendant seeking to vacate a judgment by confession must make a clear showing that he has a defense to the action, and the affidavit filed in support of such motion is construed most strongly against the defendant.

The affidavit shows that the note was given for a valid consideration and there is no showing that any accounts or notes were collected which should have been applied upon the note; there is no averment that defendant in error Bundy, had any notice or knowledge of any kind of the alleged agreement between the plaintiff in error and the payee of the note. The note having been assigned for value before maturity, to defendant in error Bundy, there being no allegation that Bundy was other than a holder in due

course, any defense which plaintiff in error might have had or might have been entitled to, as against a payee of the note cannot be urged in this proceeding to affect the rights of defendant in error Bundy as a holder in due course and before maturity of the note.

Counsel also contends that by the provision of the note that the time of payment thereof could be extended without knowledge or consent of the maker. We think there is no merit in this contention for it was held in Matzenbaugh vs. Doyle, 156 Ill. 331, that the warrant of attorney in a judgment note conferred no authority to enter judgment on the note after the plaintiff's remedy for the debt thereby evidenced had become barred by limitation.

We are of the opinion that the affidavit filed in support of the motion to vacate the judgment did not show a meritorious defense and that the trial court did not err in overruling the motion to vacate the judgment.

For the reasons aforesaid the judgment of the Court below is affirmed.

A F F I R M E D.

Not to be reported in full.



STATE OF ILLINOIS.
APPELLATE COURT,
FOURTH DISTRICT.

FILED

FEB 1 1929

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

OCTOBER TERM, A. D. 1928.

TERM NO. 21.

AGENDA NO. 44.

ANNA READ,
Appellee.

VS.

TERMINAL RAILROAD
ASSOCIATION OF ST. LOUIS,
Appellant.

2511A. 627³

Appeal from the City Court
of
East St. Louis, Illinois.

Newhall, J. This is an action of case brought in the City Court of East St. Louis by Anna Read, appellee, against Terminal Railroad Association of St. Louis, appellant, to recover damages for personal injuries, which appellee claims to have sustained on the 29th day of October, 1927.

The declaration alleged that while appellee, with due care and caution for her own safety, was riding as a passenger in an automobile driven in an easterly direction along St. Clair Avenue, in the City of East St. Louis, across the railroad tracks of appellant, appellant negligently and without warning backed a locomotive across said crossing, and collided with the automobile in which appellee was riding, thereby causing the injury sued for.

Plea of not guilty was filed, the case was tried before a jury, which returned a verdict in favor of appellee in the sum of \$650.00, and, after motion for a new trial, judgment was entered on the verdict.

Testimony on the part of appellee shows that on the day of the accident, which occurred about eleven o'clock



Term No. 21.

in the evening, appellee was riding on the front seat of an automobile being driven by her husband, James Read, in an easterly direction on St. Clair Avenue, which is one of the public streets of East St. Louis. The car was a left hand drive, and appellee was sitting on the right front seat, and her daughter was sitting in the rear seat, St. Clair Avenue runs in an easterly and westerly direction, and is crossed by four railway tracks of appellant, which extend in a northerly and southerly direction.

Appellee and her two witnesses testified that on the night in question the weather was clear, and that they were familiar with the crossing; that, as you go east toward this crossing, there is a bridge over a creek; that, after you cross the bridge, there are regular crossing gates, which were up at the time they entered upon the crossing; that to the south and on the westerly track, at about twenty feet from the south side of the crossing, there was a freight locomotive standing, and to which were attached several freight cars extending in a southerly direction, and which tended to obstruct the view; that, as the car traveled over the bridge, just before reaching the crossing, the car was stopped and shifted into low gear; that appellee and her husband looked in both directions, and saw the freight engine standing on the westerly track, and, hearing no signals and noticing that the crossing gates were up, started to drive across the tracks; that, when the car arrived at the second track, it was struck by the switch engine coming from the south, which was not seen by appellee or her husband, on account of the obstructed view, in time to avoid the accident. This switch engine struck the automobile and pushed the same to the north side of the crossing, causing damage to the car and to appellee.

The crossing watchman testified on behalf of appellant that he was on duty at the time of the accident, but at and prior to the accident the crossing gates were not lowered for the reason that the watchman was on the ground and away from the tower, which was the only place that the gates could be raised or lowered; that he saw the automobile in question enter upon the crossing, but gave no warning to the driver or its occupants; that the crossing is quite extensively used, and that there were a good many train movement up and down the tracks in question; that whistles were blown upon some engines, but that he could not say whether or not the particular engine, which struck the automobile in which appellee was riding, blew its whistle.

A bus driver, who was in his car on the east-only side of the crossing, testified that he saw the approach of the switch engine, and heard the whistle blown for the crossing and the ringing of the bell on the engine; that the driver of the auto did not stop his car before going upon the railway tracks.

The two engineers and two firemen upon appellant's engines testified that the bell was rung and the whistle blown upon the switch engine, and that there was a head light, which threw its bright light onto the crossing.

The engineer in charge of the switch engine testified that he was traveling at the rate of about twelve miles per hour; that he knew the crossing gates were up, and that he saw no signal given to warn anybody who was about to cross the tracks; that, as he approached the crossing from the south, he saw the automobile approaching from the west at about twelve miles per hour; that the automobile never stopped, but continued at the same rate of speed, and the engineer took it for granted that the automobile would stop,

but it did not; that he knew that the arms of the crossing gates were up, and that no signal alarm was given to warn anybody who was about to cross the tracks other than those given by him on his engine.

At the close of appellee's evidence, and again at the close of all the evidence, appellant moved for an instructed verdict for appellant, which motions were denied, and the only error assigned, which is argued, is the ruling of the trial court denying such motions, and that the verdict is contrary to law and evidence.

Counsel for appellant contend that the evidence shows that appellee was guilty of contributory negligence in allowing the driver of the car to proceed across the crossing without first ascertaining whether there was a train approaching on appellant's tracks.

While it is true that the question of contributory negligence is ordinarily a question for the jury, yet, when there is no conflict in the evidence, or the court can clearly see that the injury was the result of negligence of the party injured, it should direct a verdict for the defendant. However, in the instant case, it can not be said that there is no conflict in the evidence bearing on the question of appellee's exercise of due care and caution prior to the accident.

The nature of the crossing in question, by reason of the use thereof by appellant's trains and the public, was such that appellant deemed it necessary to maintain, both day and night, watchmen who were supposed to operate crossing gates from a tower erected near the crossing in order to warn and protect the public in crossing the railway tracks.

Appellee and the driver of the car were familiar with the crossing, and testified that they stopped before going upon the crossing, and, with their car under control, looked and listened for approaching trains, and

did not see or hear any trains; that they did observe a standing train on the first track, which evidently obstructed their view of the approaching switch engine; that, before proceeding upon the crossing, they observed that the gates were up, which, in the absence of other warning, after due and proper exercise of caution by them, would indicate that they might safely proceed.

It was undisputed on the trial that the crossing watchman was not at his post of duty in the tower, where he would be in a position to lower the gates for the purpose of giving timely warning to travelers on the highway of the danger of approaching trains. But the proof showed that the watchman was on the ground, where he was unable to operate the gates, and, although he testified that he saw the approaching automobile, he did nothing to warn the driver of the same.

It has been held that a flagman's duty at a crossing is to know of the approach of trains and to give timely warning to all persons attempting to cross the railroad track, and that the public has a right to rely upon a reasonable performance of that duty. (See C. & A. R. R. Co. v. Blaul, 175 Ill. 183; C. R. R. & P. Ry. Co. v. Clough, 134 Ill. 586.)

In Carlin v. Grand Trunk Ry. Co., 243 Ill. 67, it was said:-

"The use of gates or other means of warning to the public reduces the dangers, but a person about to cross the tracks is bound to know that the danger exists and to approach the tracks with care proportionate to the danger. He may rely upon the giving of the customary signals, but he must exercise due care himself."

In view of the conflicting testimony of the witnesses concerning the negligence of appellant and the exercise of due care of appellee, we hold that these questions were for the jury to determine. Under all the circumstances shown in this record, this Court would not be justified



in holding that the verdict is contrary to the weight of the evidence, either as to the negligence of appellant or contributory negligence of appellee or her husband, the driver of the car in question.

For the reasons aforesaid, the judgment of the City Court of East St. Louis is hereby affirmed.

AFFIRMED.

Not to be reported in full.



FILED

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

RECEIVED
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILL.

OCTOBER TERM, A. D. 1928.

1928 O. 27.

AGENDA NO. 29.

MORA SCHIERRE,

Appellee,

VS.

GEORGE F. MILLER,

Appellant.

:
:
: APPEAL FROM THE CITY COURT
:
: OF EAST ST. LOUIS, ILLINOIS.

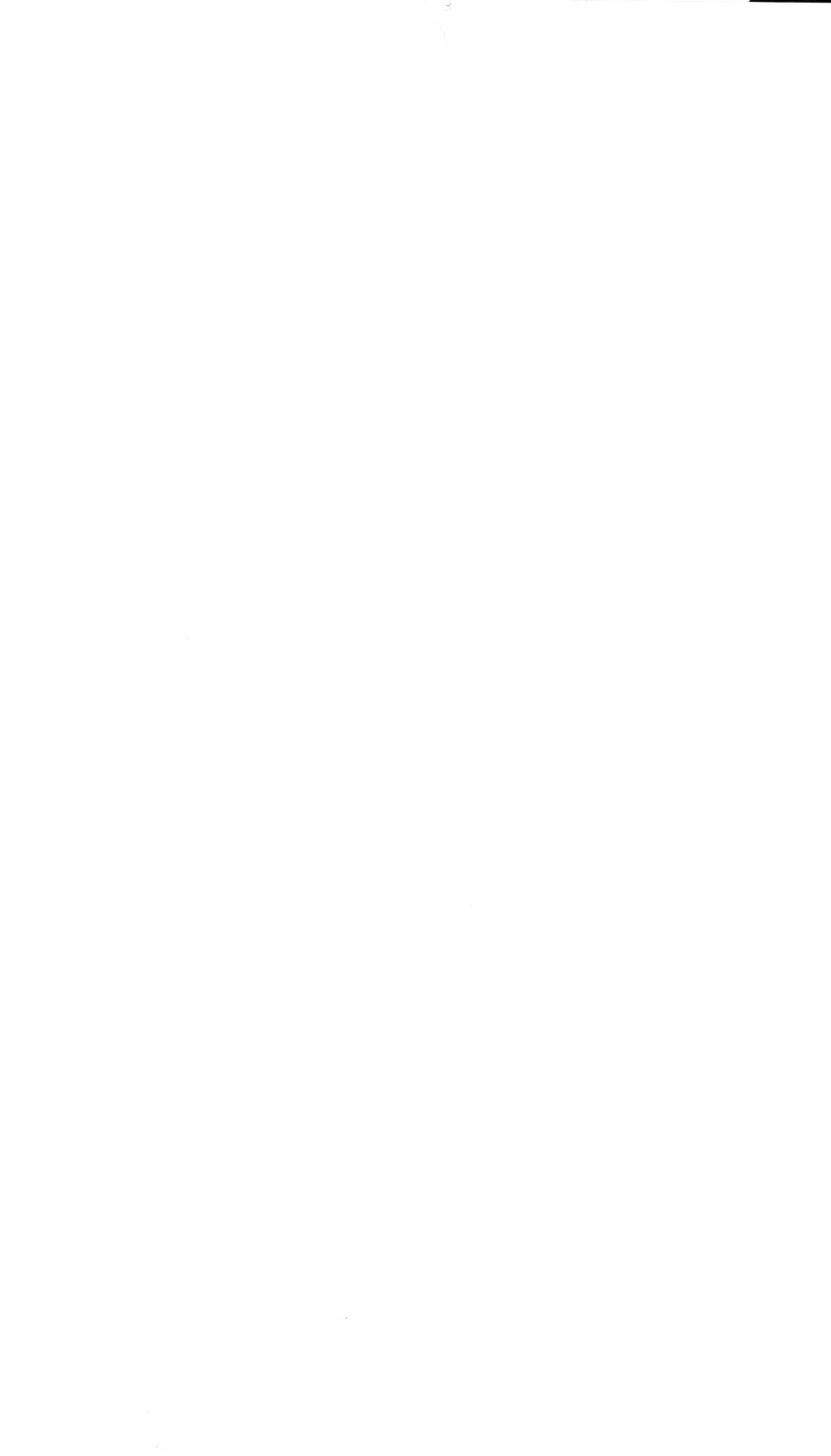
251 I.A. 627⁴

NE HALL, J.

This is an appeal from a judgment of the City Court of East St. Louis for \$1,500.00 in favor of appellee against appellant in an action of case for damages for personal injuries sustained by appellee while riding as an invited guest in the automobile of appellant, whose car was struck by another automobile at the intersection of Eighth Street and Summit Avenue, in East St. Louis, Illinois.

The first count of the declaration charged general negligence. The second count charged violation of the city ordinance requiring vehicles to stop before crossing a boulevard, namely, Eighth Street. Appellant filed the general issue to both counts.

Proof tended to show that at the time of the accident in question appellant was employed as a printer in St. Louis, Missouri; that he lived in East St. Louis, and went to his work in a Dodge sedan; that in the afternoon of the day in question, as he was about to pass over a bridge connecting East St. Louis with St. Louis, he invited appellee and her friend to ride across the bridge in appellant's car; that, after crossing the bridge, appellant drove west on Summit Avenue across Eighth Street, in East



St. Louis; that, as the car proceeded along Summit Avenue, appellant was sitting on the left front seat; that appellee and her friend sat in the rear seat; that Eighth Street is a boulevard, and, at Summit Avenue, is protected by a boulevard stop sign; that Eighth Street is a north and south street.

Appellant, driving west on Summit Avenue, reached Eighth Street where he says he stopped his automobile, and looked up and down Eighth Street, and that he did not see any car approaching, and started to cross Eighth Street, and a car, driven by the witness, Pete Young, approaching the intersection from the north, struck appellant's car a little back of the center on the right side, turning it completely around, and that, as a result of the collision, appellee was thrown partly through one of the back windows, receiving severe injuries.

Testimony on the part of appellee tends to show that appellant failed to look when he was about to cross Eighth Street, and that he did not make the boulevard stop. Just before appellant crossed Eighth Street, he faced to the south, and was trying to look over his left shoulder toward the occupants in the rear seat. Appellee's testimony tends to show further, that appellant then picked up speed, and drove across the boulevard without looking and without making the stop.

Pete Young the driver of the car which collided with appellant, testified that, when he got about forty or fifty feet from the corner of Eighth Avenue and Summit Street, appellant drove the car from Summit Street on to Eighth Street without stopping; that he had nearly crossed Summit Avenue before he struck appellant's car; that he was driving about fifteen miles per hour. Young's wife, who was riding with him, corroborated his version of the accident.

The only errors assigned, which are argued in appellant's brief, are the errors of the trial court in the giving of appellee's instructions, and that the verdict is excessive because of the alleged fact that there are no permanent injuries sustained by appellee.

Appellee first contends that the court erred in giving appellee's first instruction, which, among other things, states that, if the negligence of the defendant "approximately caused or contributed toward the injuries of the plaintiff", then the plaintiff is entitled to recover. It is urged that this instruction is erroneous because it does not limit the liability of the defendant to the "approximate cause" of the injury.

In Athens Mining Company vs. Carnduff, 221 Ill. 354 (360), it was held that the use of the phrase "approximately contributed" in an instruction was interchangeable with the use of the term "approximately caused", and that an instruction, which contained the term "approximately contributed to" was not reversible error. Under the authority of this case, we hold that the giving of defendant's first instruction was not reversible error.

Appellant next contends that appellee's second instruction is a gross misstatement of the law, and that it, in effect, directed the verdict. This instruction contained substantially the provisions of the statute requiring vehicles approaching from the left to give the right of way to vehicles approaching from the right at street intersections, and, in case appellant failed to give such right of way, and such failure approximately cause or contributed to the injuries of appellee, while in the exercise of due care, then appellee would be entitled to recover.

It has been held that an instruction, which lays down a rule of law in substantially the wording of the statute, is correct. (See Geschwindner v. Comer, 222 Ill. App. 417.)



Counsel for appellant contend that this instruction should have contained the element of the respective distances of the two cars from the intersection and their relative speed in order that the jury might determine as a question of fact whether it was the duty of appellant to stop and yield the right of way to an approaching car from the right or whether appellant, in the exercise of due care, might have proceeded across the intersection without danger of a collision.

In support of this contention, appellant cites the cases of *Heidler Co. v. Wilson & Bennett Co.* 243 Ill. App. 89, and *L. B. Piper Co. v. Yellow Cab Co.* 246 Ill. App. 487.

The facts in the foregoing cases were entirely different from the facts in the case at bar, and were cases where the driver of the car approaching from the left had an opportunity and did observe cars approaching from the right, and it was held that where a driver of a vehicle approaches an intersection, and he sees another vehicle approaching from the right at a greater distance from the intersection, and if at a speed such as is used in the exercise of due care, he believe he will be across the intersection before the vehicle approaching from the right reaches it, then the latter car is not necessarily one "approaching from the right" within the meaning of the statute, so as to require such driver to stop or yield the right of way.

In the instant case, appellant does not contend that he saw any car approaching from the right when he approached the intersection, and the case was not tried on the theory of exercising due care in view of the respective distances of the two cars from the intersection or their relative speed in approaching the intersection.

If these latter elements had been involved

in the instant case, then the instruction should have contained the element of the respective distances and the speed of the two cars.

Under the facts, as shown by this record, we are of the opinion that it was not reversible error to give this instruction.

Counsel also criticize the wording of appellee's instructions numbered three and five, but, after consideration of contention of counsel, we do not think there is any merit in their criticism of these instructions. Counsel also contend that the sixth instruction on damages is erroneous because it refers to appellee's permanent injuries, and there are no permanent injuries shown in the record. We do not find that there is anything in this instruction which refers in any way to any permanent injuries, as such, of appellee. The instruction refers merely to the injuries of appellee, without any particularization as to whether they are permanent or otherwise.

Appellant's last contention is that the verdict is excessive, because of the fact that there are no permanent injuries to appellee. Appellee's physician testified as to the injuries and treatment, which appellee had received, and this testimony was not contradicted, and, in view of the nature and extent of appellee's injuries, as shown by the record, we are of the opinion that the verdict is not excessive.

For the reasons aforesaid, the judgment of the Court below is affirmed.

AFFIRMED.

Not to be reported in full.



STATE OF ILLINOIS.
APPELLATE COURT,
FOURTH DISTRICT.

FILED

FEB 1 1929

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

OCTOBER TERM , A. D. 1928.

TERM NO. 29.

AGENDA NO.38.

JESSE SUTTON,
Appellee.

VS.

THE HOME INSURANCE
COMPANY, a Corporation.
Appellant.

251 I.A. 627⁵

APPEAL FROM THE CIRCUIT COURT
OF
LAWRENCE COUNTY.

Newhall, J. This was an action of assumpsit brought by appellee against appellant to recover on a fire insurance policy in the sum of \$800.00 insuring certain household effects of appellee.

The declaration alleged that on May 22, 1926, appellant made and delivered to appellee a policy of insurance which was set out in haec verba in the declaration. Appellee averred that he had kept and performed all things in said policy contained in his part to be kept and performed, and alleged that he had sustained loss and damage by fire on said property in the manner and to the amount aforesaid; that appellant, although often requested, had not paid to appellee the amount thereof, but refused so to do to the damage of appellee.

Appellant filed the general issue and six special pleas, and to each plea replications were filed, and the cause submitted to trial before a jury. The second plea alleged that the interest of the insured was other than the unconditional and sole ownership.

The third plea alleged that the policy was void because of the keeping of an excessive amount of gasoline on the premises. The fourth plea alleged that the policy was void because of false swearing by appellee relative to his knowledge of the cause of the fire. The fifth plea alleged that the property was destroyed by the procurement of the plaintiff and others mentioned for the purpose of defrauding appellant. The sixth plea alleged that appellee did not give immediate notice of the loss in writing or make a complete inventory, as required by the policy. The seventh plea alleged that the property was destroyed through collusion, conspiracy, and procurement of appellee and certain other persons mentioned in the plea.

The jury returned a verdict in favor of appellee in the sum of \$800.00. Motions for a new trial and in arrest of judgment were made and overruled, and judgment entered on the verdict.

The first error argued by appellant is that the trial court refused to admit the testimony of the witness, Brink, who was asked to state how the fire on the premises in question acted with reference to other gasoline or kerosene fires that he had observed. This question was improper under the holding of the Supreme Court in Chicago & Alton Railroad Co. v. Esten, 178 Ill. 192.

Counsel next contend that the trial court erred in sustaining objections to the deposition of the witness, Ethel Sutton, and the alleged statements made by the witness. Ethel Sutton, in her deposition, denied any knowledge of the fire in question or any connection of appellee with the same. She was offered as appellant's witness, and it is urged that her testimony, denying any knowledge of the fire, was a surprise, and counsel sought to impeach her by calling her attention to previous alleged written statements made by her.



It is only where a witness unexpectedly gives testimony against a party calling him, that such party has the right to specifically call the attention of the witness to his former statements, but, if the witness denies the alleged statements, the party calling him must be concluded by his answers, and is not allowed to show that the witness did, in fact, make those statements, either for the purpose of impeachment or as original evidence of the facts sought to be proved. (People v. O'Gara, 271 Ill. 138(143) .) This, however, does not preclude the party from proving by other witnesses the facts sought to be proved by the witness giving such unexpected testimony.

Counsel for appellant further contend that the trial court erred in refusing to admit the testimony of the witness, Coombs, concerning conversations with one Clarence Sutton, in the absence of appellee, on the theory that a fraudulent conspiracy existed between appellee and Clarence Sutton to set fire to the premises in question for the purpose of defrauding appellant. In order to render such testimony competent, a conspiracy must first be established, before the acts or declarations of a third person, done or made out of the presence of appellee, can be used as evidence against him. (See People v. Bundy, 295 Ill. 328.)

It is next contended by appellant that appellee's given Instructions One and Two were erroneous, and that the court erred in refusing to give appellant's Instruction Nine. We have examined these given instructions on behalf of appellee, and, while they are subject to criticism, we do not believe that the giving of them was reversible error under the facts shown by this record. The substance of appellant's refused Instruction Nine was given by the court in appellant's Instruction Eight.

Appellant next contends that the court erred in refusing to direct a verdict for appellant on the ground that it was not shown that the property burned was located on the premises described in the policy. The proof shows that the agent came to appellee's home, which was described as being situated at 14th and Walnut Streets, in Lawrenceville, and renewed an insurance policy on the furniture contained in the home of appellee. On the trial, no question of variance was raised or called to the attention of the court, and appellant is not in a position to raise this question for the first time in a court of review.

Appellant also contends that appellee did not make or establish sufficient proofs of loss under the terms of the policy. The proof tends to show that appellant, after the fire, denied liability on the ground that appellee had conspired with others to burn his property; that appellee did furnish the company with an affidavit as to his knowledge concerning the fire and the amount of his loss, and apparently no objections were then made as to the sufficiency of the proofs of loss.

Where an insurance company, after a fire, refuses to pay the policy for other reasons than objections to the form and sufficiency of the proof of loss, the objections to such proofs of loss are thereby waived. (Williamsburg City Insurance Co. v. Cary, 83 Ill. 453; St. Onge v. Hartford Fire Insurance Co., 204 Ill. App. 127.)

Appellant's final contention for reversal is that its motion in arrest of judgment should have been sustained on the ground that the declaration failed to state a cause of action. It is urged that the declaration does not contain any allegation that the property covered by the



policy has been lost or damaged; that the plaintiff had any interest in the property; that the time or place of loss is not alleged, or that plaintiff gave any notice of loss or submitted any proofs of loss within the time fixed by the policy.

The declaration alleged the making of the policy on May 22, 1926, insuring against loss by fire, and the policy was set out in haec verba. It further alleged that appellee had kept and performed all things in said policy on his part to be kept and performed; that appellee had sustained loss and damage by fire on said property; that appellant refused to pay, and that appellee's damages were laid at One Thousand Dollars.

The policy was for a term of three years, and this suit was filed September 9, 1927. The declaration was loosely drawn, and appellant did not demur but filed the general issue and special pleas denying ownership of the property, and averred the keeping of gasoline contrary to the terms of the policy; that appellee, in order to support his claim for loss, in said declaration swore falsely as to the origin of the fire; that the property mentioned in said policy was destroyed by appellee; that appellee did not give immediate notice of said fire, as provided in said policy. Replications to the pleas were filed and evidence offered in support of the allegations of the declaration without the objection being made as to any variance, or that proof did not tend to support the declaration,

In *Tonsor et al. v. Fidelity & Deposit Co.*, 173 Ill. App. 383, Page 388, the court said:-

"One of the objects to be obtained by pleading is to intelligently present to the jury the several matters that are in dispute between



the litigants. Mere irregularities will not work a reversal of a judgment. (Wallace v. Curtiss, 36 Ill. 157; Rubens v. Hill, 213 Ill. 523. A judgment will not be reversed or impaired or in any way effected by reason of any imperfections, omissions, defects, matters or things in the process or pleadings, unless it shall appear that either party has been prejudiced thereby. Sec 6, Chap. 7, Hurd's Revised Statutes (Amendments and Jeofails)."

In Rubens v. Hill, 213 Ill. 523, page 537,
it was held:-

"It is claimed by counsel for appellant, that the declaration is defective in not averring that appellant used or occupied the premises in question. If such a defect exists in the declaration, we think that it was cured by the pleas. The pleas, as set forth in the statement preceding this opinion, averred that, after the making of the lease, the appellee entered upon the possession of the appellant and evicted him. In Wallace v. Curtiss, 36 Ill. 156, where there was a material omission in the declaration, it was held that such omission was supplied by the special plea, it being there said (p. 158): "The pleas cured the omission. * * * * The issues were not alone on the facts stated in the declaration, but upon the agreement stated in the special pleas, and they may be taken as amendatory of the declaration, of the issue and verdict, in order to favor the justice of the case." * * * We think, moreover, that such other formal defects, as are alleged by the appellant to exist in the declaration, were cured by the verdict, and under the Statute of Amendments and Jeofails, which latter statute provides that "judgments shall not be arrested * * * * for any mispleading, insufficient pleading," etc. (Starr & Curt. Ann. Stat. -2d ed. - p. 390; Keegan v. Kinnare, 123 Ill. 280.)"

To the same effect is the case of Amslor v. Bruner, 173 Ill. 337.

There is no serious contention made that the evidence heard by the jury was not sufficient to warrant the amount of the verdict that was rendered, and we are of the opinion that no substantial error occurred on the trial which would justify a reversal of the case.

For the reasons aforesaid, the judgment of the trial court is affirmed.

AFFIRMED.

Not to be reported in full.

FILED

FEB 1 1928

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

OCTOBER TERM, A. D. 1928.

TERM NO. 43.

AGENDA NO. 2.

A. P. CHAMBERLAIN,
Appellee,

VS.

EAST ST. LOUIS YELLOW CAB CO.,
Appellant.

: 2511 A. 628
: APPEAL FROM THE CIRCUIT
: COURT OF ST. CLAIR COUNTY.
:

NEWHALL, J.

Appellee recovered a judgment in the court below for \$1200.00 for injuries which he claims to have sustained in an automobile collision with a taxicab alleged to have been negligently operated by appellant.

The testimony shows that on the evening of January 24, 1926, appellee was driving a Cadillac car on the public highway in a westerly direction toward the City of East St. Louis; that he collided with one of appellant's Yellow Cabs coming from the opposite direction; that the concrete roadway was partially coated with ice and snow. The evidence as to the cause of the collision is admitted by counsel for appellant to be sharp conflict.

The evidence upon the part of appellee tended to show that, as the two machines approached each other, the cab owned by appellant ran off the concrete, and the driver, inattempting to get back on, drove across the roadway, and struck the left rear of appellee's car. As a result of the collision, appellee's car was damaged and he was thrown from his car to the pavement causing bodily injuries necessitating a trip to a hospital, where he received medical care; that his head was cut, and his ribs broken on the right side; that he received medical

treatment for his injuries; that prior to the accident he had worked as a bricklayer for Fourteen Dollars per day, and had been unable to work for nearly two years on account of his injuries.

Appellant's driver testified that the collision was occasioned by appellee applying his brakes, causing his car to skid on the slippery pavement, around in front of appellant's car, and that the accident was unavoidable.

The first contention argued by appellant for a reversal, is that the Court erred in admitting evidence tending to show, as an element of damage, that appellee's car was damaged beyond repair while the declaration only alleged that it was damaged in the sum of Two Hundred Dollars for repairs expended by appellee.

Appellee offered evidence tending to show that his car was completely damaged, and that it was not practical to repair the same. This testimony was objected to on the ground that the witness was not shown to be qualified. The evidence tended to show that the witness was familiar with the value of the car in question before and after the accident. He testified that it was worth Five Hundred Dollars before the accident, and that afterwards it was only of junk value.

No objection on the trial was made that this evidence was incompetent on the ground that the declaration claimed only damages due to necessary repairs. An alleged variance between the allegations and the proof, which might have been obviated by amendment of the declaration, cannot be availed of an appeal where no specific objection as to such variance was made on the trial. (See Carney v. Marquette Third Vein Coal Mining Co. 260 Ill. 220; Pihl v. Springfield Consol. R.R. Co. 219 Ill. App. 586.)

Appellant also contends that the trial court



erred in admitting the evidence of appellee's medical witness. This witness testified that he knew what were the fair, customary, and reasonable charges for medical services in St. Louis and vicinity. Objection was made by appellant that there was no foundation laid for medical attention, and that the witness was not able to state what would be a fair fee, and, for that reason, objected to the answer of the witness. We think that there is no merit to this objection, for the answer of the witness tended to show that he was qualified to express his opinion as to what would be a fair and reasonable fee, and there was evidence in the record that appellee had received some medical attention at and subsequent to the accident, but the extent and the necessity thereof do not appear from the record. Without objection, the witness testified as to what would be a reasonable fee for each treatment, and apparently specified some injuries for which there was no foundation in the evidence.

The cross-examination disclosed that the witness did not have sufficient information as to the particular medical treatment appellee had received, or the necessity therefor, and, undoubtedly, if appellant had moved to strike out this testimony and to instruct the jury to disregard it, the Court would have done so. The objectionable part of this testimony was not raised in apt time on the trial, and we are of the opinion that the admission of this testimony was not reversible error. (See Schmitt v. Kurrus, 234 Ill. 578, page 581.)

Counsel also contend that the trial court erred in permitting counsel for appellee to argue certain alleged prejudicial matter to the jury, which appears from an affidavit of appellant's counsel in the abstract of record. This affidavit was not made a part of the bill of exceptions, and there does not appear in the bill of ex-

ceptions, any objection or exception to counsel's argument for appellee before the jury. In order to preserve for review alleged improper arguments of counsel before a jury, such portions of the argument as are objectionable must be certified to by the trial court in a bill of exceptions. (People v. Whittington, 143 Ill. App. 445.)

We are of the opinion that the verdict is not excessive in view of appellee's loss of time, property, and earning capacity; that the verdict is supported by the greater weight of the evidence, and, accordingly, for the reasons above set forth, the judgment of the trial court is affirmed.

A F F I R M E D .

Not to be reported in full.



FILED

STATE OF ILLINOIS.
APPELLATE COURT,
FOURTH DISTRICT.

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CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILL.

OCTOBER TERM, A. D. 1928.

TERM NO. 46.

AGENDA NO. 20.

2511A. 628²

BENJAMIN HARRISON, by)
ELMER HARRISON, his)
Father and Next Friend,)
Appellee.)

VS.)

E. N. LANGSTON,)
Appellant,)
and THOMAS ROMAINE.)

APPEAL FROM THE CITY COURT

OF

EAST ST. LOUIS, ILLINOIS.

Newhall, J. This is an appeal from a judgment on the City Court of East St. Louis in the sum of one thousand dollars against appellant, E. N. Langston, in an action brought by Benjamin Harrison, by his father and next friend, to recover damages for injuries alleged to have been sustained by him on November 12, 1927, when struck by a truck.

The declaration charged that appellant and one Thomas Romaine, who was a defendant in the court below, but not served with summons, were possessed of an automobile, which appellant so negligently drove that it injured appellee.

Appellant, Langston, filed the general issue and special plea denying that he was possessed of or operating and controlling the said truck. The case went to trial before a jury to determine the issues between appellee and appellant, Langston.

Proof on the part of appellee tended to show that the truck, driven by Romaine and in which appellant was riding, was driven south in the middle of Tenth Street;

that the truck struck appellee and skidded about twice the length of the truck; that the skid marks of the truck on the pavement at the scene of the accident were about forty feet in length.

Two police officers testified to certain conversations with appellant and Romaine with reference to the ownership of the truck, the substance of which conversations are to the effect that appellant was the owner of the truck, and that Romaine was not the owner.

Without objection, testimony was offered as to certain medical and hospital bills incurred by the father of the boy, amounting to the sum of about \$188.00. Appellee was a boy about six years of age at the time of the accident.

Testimony on behalf of appellant tended to show that Romaine had bought the truck from appellant about a week prior to the accident, and that appellant was riding with Romaine at the time of the accident; that as appellant and Romaine proceeded down Tenth Street there was a coal wagon on the right-hand side going in the same direction; that on the left-hand side of the street were automobiles parked, and that coming toward them from the left side was an ice wagon; that appellee jumped or ran from in back of the ice wagon, and struck the truck just back of the front fender, and fell to the ground; that Romaine tried to avoid the accident by swerving his truck to the right, but was unable to do so.

Appellant testified, in his own behalf, that about a week before the accident he had sold the car in question for about \$150.00 to Romaine; that he had received \$10.00 on account and gave Romaine a bill of sale for the car. He testified that his version of the accident was the same as that of the witness, Romaine.

After the accident, the boy was taken to the hospital by appellant, where he was attended by a physician, who testified that appellee had a fracture of both bones of the right lower leg, and numerous lacerations and bruises about the head and body; that he was in the hospital about twenty days under medical care; and that, as a result of the accident, there were scars on his face and one leg was slightly bowed, with a formation of callus where the break occurred in the two bones.

The jury rendered a verdict of \$2,000.00, and on motion for a new trial, the trial court required a remittitur of \$1,000.00, which was made, and judgment for \$1,000.00 against appellant, Langston.

The errors assigned for reversal are that the court admitted improper evidence; that erroneous instructions were given, and that the verdict and judgment were contrary to the law and evidence.

Appellant appeared as his own counsel in the trial of the case, and without objection the hospital and medical bills were testified to, from which it appeared that the father of appellee had received these bills amounting to the sum of about \$188.00.

This testimony was incompetent, and undoubtedly, if objection had been made in the trial court, the objection would have been sustained. But, in view of the fact that the court required a remittitur of \$1,000.00, this, in our opinion, under the circumstances of this case, cures any error that the court might have committed in admitting testimony as to the medical and hospital bills. (McMahon v. Chicago City Railway Co., 239 Ill. 334.)

On the question of the ownership and control of the truck, the evidence shows that appellant, Langston, was riding in the truck with Romaine.



Two police officers, who saw appellant, Langston, and Romaine, driver of the truck, immediately following the accident, testified that Romaine, in the presence of appellant, stated that he, Romaine, was not the owner of the truck, but that Langston was the owner. This evidence was not denied by Langston on the trial, and it was purely a question of fact for the jury to determine from all of the evidence as to who was the owner of the truck, and whether or not it was being operated under his direction and control.

We cannot say, from a consideration of the entire case, that the verdict of the jury on this question was against the weight of the evidence.

Appellant complains as to the admission of certain incompetent testimony on the trial, but no objection was made in the trial court, and appellant is not now in a position to urge error in that respect.

Appellant complains as to the form of instructions, which were instructions as to the form of verdict only, and referred to defendants in the plural rather than in the singular. It is urged that, because there was only one defendant on the trial, the instruction as to the form of verdict was erroneous. We think that there was no merit in this contention, for the jury did return a verdict which applied only to the appellant, Langston.

It is also urged that appellant was not guilty of any negligence which was the proximate cause of the accident, and that appellee was guilty of contributory negligence. Appellee was a minor six years of age, and, under the law, cannot be guilty of contributory negligence. It was the duty of appellant to use ordinary care to avoid injuring him.

In the case of *Morrison v. Flowers*, 308 Ill. 189, it is said, as follows:-



"The driver of a motor vehicle on the streets of a city is bound to recognize the fact that the children will be found playing in the street; that they may sometimes attempt to cross the street unmindful of danger, and such driver owes the children the duty of reasonable and ordinary care under the circumstances. And also where the driver of a motor vehicle is obeying all the requirements of the law and the regulations for operating his machine, he is not, as a rule, liable for injuries received by a child who darts in front of a machine so suddenly that the driver cannot stop or otherwise avoid injuring the child, but if one is running his automobile at a speed in excess of the statutory limits or at an unreasonable or dangerous speed, he cannot escape liability because the child who is injured ran in front of the automobile so suddenly that the accident was unavoidable."

Proof tended to show that the car, which caused the accident, was being driven at a speed in excess of what would be reasonable under all of the circumstances of the case, and, from this view of the case, we consider it a question of fact for the jury to determine whether or not appellant was guilty of the negligence charged, and whether or not the accident was unavoidable.

After giving due consideration to all of appellant's contentions, we are of the opinion that there is no reversible error in the record, and that the judgment of the court below should be affirmed.

AFFIRMED.

No to be reported in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
OCTOBER TERM, A. D. 1928.

FILED

RECEIVED NOV
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILL.

TERM NO. 1 .

AGENDA NO. 6.

L. J. GOEPPNER,
Defendant in Error,
VS.

251 I.A. 628³
ERROR TO THE CIRCUIT
COURT OF MARION COUNTY.

AUTO OWNERS UNDERWRITERS,
Plaintiff in Error. :

WOLFE, J.

This is an action of assumpsit brought in the Circuit Court of Marion County by L. J. Goepfner, defendant in error, against the Auto Owners Underwriters, a reciprocal insurance company, and the plaintiff in error, to recover damages to his Packard automobile caused by its collision against an embankment. Before the collision the plaintiff in error had issued to the defendant in error an insurance policy insuring the car of the defendant in error against loss or damage by reason of the collision, accidental upsetting or overturning of the car. There was a hearing before the trial judge without a jury, and a judgment rendered for the defendant in error for the sum of \$900.00 and costs of suit.

It is contended that the judgment cannot be sustained because the allegations of the declaration make out one case and the proof by the plaintiff makes out another, it is necessary to set forth a summary of the declaration; This summary contains many of the facts in the case; most of the controlling facts not involving the question of damages and written notice of intended suit, are not in dispute.

The declaration alleges that on January 30,



1926, the Auto Underwriters delivered to Goeppner a policy of insurance, which is set forth in haec verba. The material parts of the policy are as follows: The company insures the car of the defendant in error against loss or damage by collision to the extent of \$2250.00. The collision clause provides as follows: "Collision: Accidental Collision with another object, either moving or stationary, (1) Accidental upsetting or overturning of the insured motor vehicle".

Under the general heading "Conditions and Limitation" the policy reads: "The Underwriters shall have a reasonable time after the receipt of the sworn statement and proof of loss in which to repair or replace the property lost or damaged, or to pay in money the amount due the subscriber under the provisions of this policy." "If the insured motor vehicle or any part thereof damaged, destroyed or stolen, the Underwriters shall have the right to repair or rebuild the insured property or to replace it with property of like kind and quality, or to pay the subscriber within the limits of this policy what it would cost the underwriters to repair rebuild or replace the property damaged." "The loss of or damage to ***** or any equipment or property not actually attached to and a part of the insured motor vehicle is not covered by this policy".

The policy further requires that no action shall be instituted against the insurer unless brought within 12 months after the occurrence causing the loss, and in no event unless the insurer shall first have had 30 days written notice of the insured's intention to bring such suit.

The declaration then alleges that on August 12, 1926, the automobile of the insured collided with an embankment at the side of a public highway in St. Clair

County, and thereby the crank case, frame, radiator, bumper motormeter, oil system, tires, tubes and various other parts and pieces of the car were broken, bent, twisted, injured and damaged to a large amount, to-wit, the sum of \$2200.00; that plaintiff gave the defendant notice of said accidental overturning and injury and damage to the car, and that defendant requested the plaintiff to deliver the automobile to it for the purpose of repairing and replacing the same to its former condition within a reasonable time according to the terms and conditions of the policy; that the plaintiff delivered the automobile to the defendant for that purpose. And thereby and by means thereof waived any further or additional notice of said accidental damage and of the making and filing with the defendant of any proof of loss; that plaintiff paid the premiums as required by the policy and kept and performed the terms and conditions of the policy upon his part to be performed.

The declaration further alleges "that although more than four months has elapsed since the accidental upsetting overturning, injury and damage to the said automobile and the receiving of the said automobile of the plaintiff by the defendant for the purpose of repairing the same, the defendant has wholly failed and refused to properly repair or rebuild the said car within a reasonable time according to the terms and provisions of said policy of insurance, or to pay the plaintiff the amounts specified in said policy or the amount of said damage and injury to the said automobile aforesaid, although requested to do so. And thereupon the plaintiff demanded of the defendant to pay him, the plaintiff, the amount of the said damage and injury to said automobile, and that unless paid at once he would bring suit on the said policy and thereupon the defendant then and there refused to pay the amount of said damage or injury of any part thereof, and told said plaintiff



to bring said suit if he desired and thereupon waived any further or additional notice of the bringing of such suit as required by the said policy." By means whereof the defendant became liable to pay the plaintiff the sum of \$2200.00 as in and by said policy agreed, to the damage of the plaintiff of \$2250.00.

To this declaration the plaintiff in error filed a general and special demurrer which was overruled. Thereupon the plaintiff in error filed several pleas to the declaration, the first of which was non-assumpsit. The second plea alleges that if the insured motor vehicle or any part thereof is damaged or destroyed, the underwriters shall have the right to repair or rebuild the insured property, or to re place it with property of like kind and quality, or to pay the subscriber within the limit of the policy what it would cost the underwriters to repair, replace, or rebuild the property damaged; that defendant did elect to repair the said motor vehicle and did repair the same and deliver it to the plaintiff. A demurrer was sustained to the third plea of the plaintiff in error. The fourth plea sets up the provisions of the policy that no action shall be instituted against the underwriters unless the insured shall have had thirty days written notice of the insured's intention to bring such suit; and that the underwriters did not have thirty days written notice of such intention to bring suit. The fifth plea alleges that the defendant did elect to repair the said motor vehicle and did repair the same and did tender to the plaintiff the said motor vehicle and did tender him the keys for the same; that plaintiff refused to receive the said motor vehicle, or said keys, and defendant delivered the motor vehicle to the place in the garage where plaintiff had kept said motor vehicle prior to the delivery of the same to the defendant,



and that the defendant did deliver the said keys upon the desk of the said plaintiff.

The defendant in error filed replications to the pleas, and the hearing before the Court was upon the issues thus presented by the pleadings.

It is contended by the plaintiff in error, as a matter of law, that when the insurance company exercised its option conferred by the policy to repair the damage to the car, the policy became in effect a new and independent contract to repair the property, and the insurer's liability thereafter was for a breach of the contract to repair and not under the policy to pay the insurance. And such being the law, the plaintiff in error further maintains no action will lie on the policy but an action should be brought on the contract to repair if the insured deems he has sustained damage by reason of a failure to repair as required by the terms of the policy. In support of its position the plaintiff in error cites the following cases: Hartford Fire Insurance Company v. Pebbles Hotel Co., 82 Fed. 546; Heilman v. Westchester Fire Ins. Co., 75 N. Y. 7; Wyncopp v. Niagara Fire Ins. Co. 91 N. Y. 478; Henderson and Henderson v. Crescent Ins. Co. 48 La. Anno. 1176, 20 So. 658. This is no doubt the fixed law in the State of N. Y. Gaffey et al. v. St. Paul Fire & Marine Ins. Co. 221 N. Y. 113, 116 N. E. 778, overruling the same case and reported in 149 N. Y.. Supplement 859.

The same conclusion as announced in the New York case was also reached in the case of Zalesky v. Iowa State Ins. Co. 102 Iowa, 512, 70 N. W. 187. In the cases of Good v. Buckeye Mut. F. Ins. Co. 43 Ohio St. 394, 2 N. E. 420 and Fire Association of Philadelphia v. Rosenthal, 108 Pa. 274, 1 Atl. 303, it was determined that when the insurer elects to repair the damaged property under the terms



of the policy, the election once made is irrevocable and must be carried out, and the measure of damages is the cost of the suitable repairs of the parts of the property injured and not the amount of the policy. But these cases do not decide that an action will not lie upon the policy after such election. Where the insurer elects to exercise the option to repair or rebuild, and totally fails to do so, the authorities differ as to whether this will preclude a recovery upon the policy. Thus in *Hartford Fire Ins. Co. v. Pebbles Hotel Company*, supra, it is stated that after such an election no action would lie to recover the money indemnity stipulated for in the policy. On the other hand in *Homo Mut. F. Ins. v. Garfield* 60 Ill. 124, it was held that the mere giving of notice by the insurer that it intended to rebuild the insured building did not change the contract of insurance in a contract to rebuild, and that the insurer, upon failing to rebuild, did become liable to pay the amount of insurance stipulated in the policy. To the same effect are the cases of *Langan v. Aetna Ins. Co.* 108 Fed. 985, affirming 99 Fed. 374; *N. W. National Ins. Co. v. Woodward*, 18 Tex. Civ. App. 496, 45 S. W. 185.

In the case at bar, under the pleadings and evidence, as presented, we do not think it necessary to enter the above field of conflict and uncertainty, beset, as we think it is, with rather vague refinements of form rather than of substance.

Our Supreme Court in the case of *Aetna Ins. Co. v. Phelps*, 27 Ill. 70, in an action on a fire insurance policy has held that the condition of the policy that the company could rebuild after a loss was inserted solely for the benefit of the company; that it was a condition subsequent which need not be negatived by the plaintiff in his

declaration, but was a matter of defense to the action, which the company should allege by special plea, and that the office of a condition subsequent is not to create the right on which the plaintiff founds his demand; but to qualify or defeat it. We, therefore, do not think that the allegations contained in the declaration with reference to the receipt of the automobile for repair and the failure to repair, are alleged solely for the purpose of charging that the plaintiff in error waived any further or additional notice of the bringing of the suit and required by the policy as argued by plaintiff in error. On the contrary we are of the opinion these allegations, being averments of the breach of the duty of the plaintiff in error to properly repair the car, after it had made its election to do so, are the basis of the cause of action and gravamen of the cause of action stated in the declaration. An inspection of the declaration shows that the issuance of the insurance policy, the collision, and the consequent damage to the car, are alleged as matters of inducement to the averment that the plaintiff in error notified the defendant in error of its intention to repair the car and deliver it to the defendant in error. *Letendre v. Automobile Ins. Co. of Hartford Conn.* 43 R. I. 410, 112 Atl. 783; *Winston v. Arlington F. Ins. Co.* 38 Court of Appeal, D. C. 61 20 L. R. A. (New Series) 960. If the plaintiff in error considered the declaration for any reason insufficient, or if he deemed the form of action improper, he should have stood by his demurrer to the declaration.

In the case of *Home Mut. Fire Ins. Co. v. Garfield*, 60 Ill. 124, in an action of covenant upon a policy of insurance the Court said: "The objections to the form of the action and the right of the plaintiff to sue cannot be availed here. These were raised by demurrer in



the Court below, as the declaration sets forth at length the policy and the notice to rebuild. This having been overruled, special pleas were filed. The appellant should have abided by his demurrer if he desired to present the question raised by it to this Court. Russell v. Whiteside, 4 Scan. 8; American Express Co. v. Pinckney, 29 Ill. 406".

On the hearing, before the Court, the defendant in error in the first instance, introduced the policy in evidence, identified himself as the insured named in the policy, proved the damage and injury to his car and that the plaintiff in error received the car for the purpose of repairing the same; also that the repairs were not made in substantial compliance with the terms and provisions of the policy and the damages resulting from the suit required.

We think that the defendant in error proved the material allegations of his declaration and that the declaration does not allege one cause of action and the proof established another.

It is also contended by the plaintiff in error that the trial court erred in its finding upon the following questions of fact submitted in writing: "If the Court holds the plaintiff is entitled to recover, is his right of recovery upon the insurance policy, or upon the contract to repair?" The Court's answer thereto was: "Upon the provisions of the policy containing the right to accept the property and to repair the same to its former condition." For the reasons stated above in this opinion we think the finding of the Court in this particular case is correct.

It is also contended that the Court erred in failing to sustain the motion of plaintiff in error to dismiss the case at the close of the evidence offered by

the defendant in error, and renewed at the close of all the evidence offered on behalf of both parties, for the reasons that the insured never gave unequivocal notice to the company of intended suit, as provided by the terms of the policy. This provision of the policy was inserted therein for the sole benefit of the company, and subject to express waiver by the company, or a waiver by such a course of conduct on the part of the company as was calculated to lead the insured to believe that the company did not require its performance. *Dwelling House Ins. Co. v. Dowdall*, 159 Ill. 179; *Metropolitan Accident Assoc. v. Clifton*, 83 Ill. App. 197. Such waiver may be by an agent who is investigating the alleged loss and looking into the justice of the claim. While so engaged, his acts and representations with respect to the matters also in his charge are those of the company, and if his acts and conduct while so engaged are inconsistent with an intention on the part of the company to insist upon a strict observance of the condition of the policy, waiver of such condition or provision might arise therefrom. *Citizens Ins. Co. v. Stoddard*, 197 Ill. 330.

Defendant in Error testified that Bryce Patchett, who was an adjuster for the company, came to his office after the car had been repaired by the company and offered to deliver the car to the defendant in error, and when he refused to receive the car, Patchett said: "There are the keys, your car is in the garage, we are done as far as we are concerned." To which defendant in error replied: "I will never take that car unless the Court tells me, and moreover, I will sue you before you get out of town." Patchett then said, "Go ahead and sue; we are done". Patchett testified that at the time this conversation took place, that he was willing to give the defendant in error \$300.00 to induce him to take the car as the same had been repaired,



and that he told him the company was through as they had done all that they would do. And that the defendant in error said "If that is true, I will sue you." To which Patchett replied, "You can go ahead and sue; we are through."

The declaration alleged the waiver on the part of the plaintiff in error of the condition requiring notice of intended suit. In the case of the Metropolitan Accident Asso. v. Clifton, supra, it was held that the condition of an insurance policy requiring a demand in writing to be made before bringing suit on the policy may be waived by the verbal demand by the Attorney for the insured upon the company's agent for payment which was refused. We think the representations and conduct by the company while engaged in looking into the justice of the claim and negotiating a settlement of the loss with the defendant in error were inconsistent with the intention on the part of the company to insist upon a strict observance of the condition of the policy requiring notice of intended suit.

It is urged that the Court erred in admitting evidence proving the market value of the car before the collision and its market value after the repairs had been made by the company to restore the car to its former condition, for the reason, it is claimed, that the measure of damages is the cost of the suitable repair of the parts damaged. This evidence was admitted by the court subject to objection.

The judgment is supported by other evidence in the case showing the cost of suitable repairs or replacements.

The plaintiff in error submitted the following question to the Court for a special finding of fact: "If the Court holds the plaintiff is entitled to recover, upon



what basis is the measure of damages?". To which the Court replied: "Cost of repairs." This really indicated that the Court was not influenced by the alleged improper testimony. Furthermore, as is said in Kreiling v. Northrupp, 215 Ill. 195: "The case was heard by the Court without a jury, and as to the evidence admitted to which objection is made, the rule is, that no improper or immaterial evidence will be presumed to have influenced the Court in reaching a decision where there is sufficient proper evidence to justify the judgment." (Atwell Printing & B. Co. v. Prairie Farmer Pub. Co. 246 Ill. App. 100; Lino v. Northwestern Pac. R. Co. 246 Ill. App. 451).

The brakes in the frame and in the crank case of the car were acetylene welded by the plaintiff in error in its undertaking to repair the car. And the plaintiff in error complains of the ruling of the Court excluding an answer to its question if any other proper method of repairing and straightening frames or crank cases of automobiles was known. We do not think plaintiff in error is in a position to urge this alleged error for the reason that it was permitted to prove that welding was one of the usual and customary methods of repairing frames and crank cases.

It is next contended by plaintiff in error that the judgment of the trial Court is based on the requirement that the company was compelled to repair all broken parts by replacing them with new parts, whereas, it is urged, it had the right to repair the frame, crank case and lubricating tank, if by so doing they would be restored to a sound or good state. In the first place the witnesses for the defendant in error testified that the frame, the crank case, and the tank could not be repaired by welding so as to restore them to their former condition. The obligation of the company was "to repair or rebuild the insured property, or to replace it with property of like



kind and quality."

Surely, if an injured part could not be repaired it should have been replaced by property of like kind and quality. It follows that the Court did not err in admitting proof of the cost of new parts to replace that, on the theory of defendant in error, could not be repaired. Secondly, the trial Court held, in replying to the fourteenth proposition of law submitted by the plaintiff in error, that "The insurer is under no obligation to furnish new parts, if the parts damaged can be repaired so as to be reasonably fit for the purpose for which they are used, if by so doing, the insurer can restore the property to substantially its former condition." The propositions of law held, or refused, are controlling. *Levy v. Glickauf*, 41 Ill. App. 251. As shown by the holdings on the above special finding and proposition of law, the trial Court decided that the measure of damages was the cost of repairing of the damaged parts including replacement, if any insured part was irreparable.

Plaintiff in error claims the damages allowed, being \$900.00 are excessive for the reason that the witnesses of the defendant in error included in their estimate of the amounts required to repair the car included the cost of new parts to replace those damaged; that the judgment includes the cost of parts not actually attached to the car. However, four automobile mechanics, all of whom know the car before the collision, and who had been such mechanics for from ten to sixteen years, testified after examining the car, that it would require new parts to properly repair the car and restore it to its former condition. An examination of the evidence shows that the judgment is supported by the following items of expense; Tank and pump, \$23.10; upper half of crank case and labor to install, \$358.25; radiator core and anchorage, \$46.15; new frame and installing,

\$373.75; radiator shell, \$28.75; lower half of crank case and installation \$46.00; new bumper, \$25.00.

The four mechanics testified that the frame had been broken, and after being welded it was sprung and not straight. Two other witnesses who were engaged in the automobile business, and who had had many years of experience driving cars, testified that the car was out of alignment. The evidence of these six witnesses further shows that the radiator, including the core and shell, was in bad condition after being repaired; that the oil tank had a hole in it. This testimony was contradicted by one witness who repaired the car for the company under a flat bid of \$574.00 for labor and material to repair the car.

The bumper placed on the car after the collision was a lighter and cheaper one than the Packard bumper, which was on the car before the collision, and the insured was not bound to accept it.

We think the judgment is amply supported by the evidence.

At the close of the case the plaintiff in error submitted fourteen propositions which it requested the Court to hold as the law of the case, and also requested the Court to find specially upon three material questions of fact.

The Court denied ten of the propositions of law submitted and held four. The findings on the questions of fact were held favorably to the plaintiff in error. The plaintiff in error assigns as error the holdings of the Court on each of the propositions denied. An examination of all the holdings of the Court reveals that the propositions which were held by the Court to be the law applying to the case embody all the propositions of law denied by the Court.

The judgment is supported by the evidence in the case and no error appearing in the record the judgment
is A F F I R M E D.

Not to be reported in full.



FILED

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILL.

AGENDA NO. 21.

251 I.A. 6284

: APPEAL FROM THE CIRCUIT COURT

: OF ST. CLAIR COUNTY.

:

The declaration consists of two counts, the first one being a general charge of the negligent running, managing and operating of the street car of the appellant, in substance as follows: That the defendant through its servants was in charge of a street car of the defendant being operated upon West Main Street in the City of Belleville, and across the intersection of 47th street and said West Main street, said streets being public streets; that while the plaintiff was driving an automobile across said intersection with due care and diligence, the defendant then and there so carelessly and negligently ran, managed and operated said street car, that as a result thereof, the street car



ran and struck with great force against the automobile of the plaintiff, etc.

In the second count of the inducement, the allegations fixing the locus in quo and the due care of the plaintiff are similar to those stated in the first count, but the breach of duty is alleged to be that the defendant ran and operated said car, then and there, at a high and dangerous rate of speed, in excess of forty miles per hour, and without ringing any bell or giving any warning or signal of its approach, so that the street car ran and struck with great violence against said automobile. Both counts allege that as a result of the collision plaintiff was severely and permanently injured about her neck and spine and became nervous, sick, lame, disordered and suffered great pain; that she also became unable to perform her usual work for a long time, etc., to the damage of plaintiff of \$10,000.00. A plea of not guilty was filed by appellant.

At the close of the plaintiff's evidence and again at the close of all of the evidence in the case, the defendant made motions, in the usual form, for a directed verdict in favor of the defendant, and both motions were overruled by the trial court. A motion for a new trial being overruled, the case was appealed to this court.

The reasons now urged for a reversal of the judgment are that the appellant was not guilty of any negligence causing or contributing to the accident, and, secondly, that the accident was caused wholly by the contributory negligence of the appellee; thirdly, by the misconduct of the plaintiff during the trial.

The evidence discloses that the appellee on April 22, 1927, and about eleven years prior thereto, lived at 5700 West Main Street in the City of Belleville. West Main street runs east and west and the intersecting streets



thereof running north and south, are numbered consecutively westward beginning from the central part of Belleville to 48th street and further on west. Appellant has two street car tracks in the center of West Main street, the south rails being called the east bound tracks, and the north rails being called the west bound tracks. West Main street is paved on both sides of the tracks with concrete slabs about eighteen feet wide which run parallel with the tracks. Forty-eighth street intersects West Main street on the north but does not extend south beyond West Main street. On the day of the accident the appellant claims that she drove her automobile eastward on West Main street to or near 4816 West Main street, parked her car there and entered the home of her mother. 4816 West Main street is on the south side of the street and is from 80 to 100 feet west of what would be the junction of 48th and West Main street if 48th street extended south, and at which latter place the evidence shows the accident occurred at about 6:15 o'clock in the morning of April 22, 1927.

The appellant operated street cars on the east and west bound tracks at approximately 15 minute intervals. This fact the appellee testified was known to her at the time of the accident. West Main street for several blocks east and west of the intersection of 48th street is level and straight.

The proof of the appellee bearing on the facts and circumstances leading up to and resulting in the accident consists of the testimony of the plaintiff and a witness named Herman Nelson. The appellee testified that she entered her automobile standing near 4816 West Main street and drove her car at the rate of five miles per hour, eastward near the curb on the south side of the street, her purpose being to drive to the crossing leading into 47th street and



then turn north, cross the two tracks, after which she intended to turn west and return to her home at 5700 West Main street. That before attempting to make the turn to drive her automobile across the east bound track she looked in the rear view mirror fastened to the inside of the car above the windshield and which gave her a clear view of the tracks in a westerly direction for a distance of about one-half of a block. There was no street car then in sight approaching toward her on the east bound track; before turning she also looked out of the automobile window on the north side and which faced the east bound tracks, where she could see for two or three blocks but saw no car approaching. When she turned her car and the front wheel had just entered the south bound track she for the first time noticed the east bound street car of the appellant which was then very close to her and collided with her automobile.

She testified that she did not drive her car along side of the street car before the accident; that the street car dragged her automobile about 40 or 50 feet before stopping; that she jumped out of her automobile while it was being dragged and fell upon the concrete pavement receiving bruises and injuries causing a nervous shock which rendered her unable to attend to her household duties or go on the streets without an attendant. She also testified that those in charge of the street car did not give any signal or warning of the approach of the car; that after the collision the automobile was pinned under the front end of the street car.

Herman Nelson testified that he lived at 4816 West Main street; that on the morning of the accident he intended to take the street car which collided with the automobile to go to Belleville. When he left his residence the street car was coming from the west but it was almost

then in front of 4816 West Main street; that he ran east on the south sidewalk and arrived near the place of the collision at about the time of the accident. That the street car was about 50 or 60 feet west of the crossing when he saw appellee making the turn; that when the automobile turned north at the crossing the street car ran into the ~~from~~ fender and wheel of the automobile; that after the street car stopped, the left front wheel and fender of the automobile were underneath the street car and in front of the side of the street car on the south side, but he was unable to say whether the automobile was hanging right at the steps leading into the front door of the street car; that the automobile had been dragged 50 or 60 feet by the street car, but that he did not measure the distance. He also testified that he was not familiar with the speed of street cars on West Main street; that the street car in question when he saw it was traveling about 30 or 40 miles an hour, he did not know exactly.

On cross examination he stated the car was going at regular speed; that the street is wide and he could see the street car coming for at least a quarter of a mile.

P. A. Houston, the motorman of the car, testified: "About 6:15 on the morning of the 22nd I was coming along there around fifteen miles an hour and there was a car came up and she took and turned right into the side of the car by the front exit door. I first saw this automobile when she turned right into me. The automobile had not been on ahead of me before that; it turned in the side of the car, at the exit door where passengers alight, which is right up against the front end. The automobile struck at that exit door where the steps are; it never got in front of my car. The car ran about twenty feet before it stopped; the auto-



mobile did not turn over or anything of that kind. The driver jumped out after the automobile had stopped; it had just stopped and she jumped out. Before this automobile ran into the side of my car I had no notice there was any automobile around it; it had never at any time had been up in front of my car within my view. I was not talking to any one at the time of the accident while I was operating my car. I was sitting there watching out ahead. I was the only one in the corner where I was sitting at that time, and no person was next to me."

Ralph Kaiser testified: "The automobile came in contact with the front end and the steps on the right hand side of the street car about four feet from the front end of the car. The motorman stopped as quick as he could. The street car ran about eighteen feet after the collision. When I got out of the street car the front part of the automobile was pinned under the steps there and the rear part of it was alongside of the car, back of the steps; the automobile was not turned over. The car stopped and we all got out and by the time we got out Mrs. Rettle was out of the car. I did not see Nelson at the time of the accident."

William Traub testified: "I was sitting in the street car on the righthand side, close to the rear of the car; I saw the top of the automobile approach; the automobile was along the righthand side of the car and it seemed like it got closer to the car all the time until it hit the steps of the car, and it just caught the wheels underneath the car. The street car wasn't going very fast; I judge about fifteen or eighteen miles an hour, and the motorman never went any more than fifteen or eighteen feet until he stopped the car. I saw this automobile from the rear, but it kept getting closer. I don't think it got ahead of the car



so that the motorman could see it. When I first saw the automobile it was to the rear of the car, then it kept coming closer it seemed, then I heard that smash-up; the automobile hit the front fender. After the street car stopped the automobile was on the side of the car. The lady jumped out and the motorman asked her if she was hurt and she said "no." I did not see the witness Nelson at the scene of the accident."

Opal Dinzing, also a passenger on the street car, testified: "I was sitting toward the front, on the righthand side; I first saw the automobile alongside of the street car just before it hit; I was up right close to the front and I first saw the automobile when it was right opposite me; I had not seen it before that time. The automobile came up from the rear of the street car; while I was looking at it she turned and hit the side of the street car, the front steps; the street car then dragged it for about fifteen or eighteen feet and stopped. The automobile bumped into the righthand side of the car. I did not see witness Nelson that morning."

Francis Bedwell, also a passenger on the street car, testified: "I was sitting in about the second seat from the front with Opal Dinzing, on the right or south side of the car. I saw this automobile that collided with the street car. The automobile was going along the side and all at once it turned to the side and crashed into the street car in the right front side of the street car, along the steps; that was about six or eight feet ahead from where I sat. The street car stopped; it ran about fifteen or eighteen feet before it stopped. When I first saw the automobile it was running along the side of the car, about two feet from the window where I sat. I did not see the witness Nelson that morning."

John Adler, testified: "The automobile that was being driven by Mrs. Rettle was on the right side of the street car, going towards Belleville; I figured that the street car was right along side of the machine; if a person looked around on the side you would have been able to see it; it was that close. The machine was south of the street car alongside of it, toward the back end. As I saw them approach the automobile didn't do anything except pull in front of the car. The car pulled the automobile about sixteen or eighteen feet and then stopped. I noticed the automobile when it turned; seemed like she turned off all of a sudden; the street car was alongside the automobile when she turned into the car. This was at 48th street. The automobile was about four or five feet from the car when she started to turn over. From the point where the collision occurred, looking westward there was nothing to obstruct the view down the street; you can see westward down the street from the point of collision about four blocks, and then looking eastward you can see about three blocks. The street is level along there and about fifty feet wide; there are two street car tracks there in the middle of the street."

William Stock, the conductor of the street car, testified: "I could look westward and see a car coming about four blocks away; the street is mostly level; there is nothing to obstruct the view looking westward from 48th street. I heard the motorman make a sudden whistle; I looked out and saw this automobile on the side of the car. I could not say where the car came from, but it was alongside the street car when I first saw it, on the right hand side, close to the front. The radiator of the automobile was about even with the bumper in the front of the car. The door and steps entering the car is on the side of the car; the collision was right at the door step where you step off and on; the street car



ran between fifteen and twenty feet before it stopped. The automobile did not get in front of the street car."

It is conceded by both parties that the plaintiff must show by affirmative proof, not only that she was in the exercise of due care for her own safety at the time of the accident, but the burden of proof is also upon the plaintiff to prove by the greater weight of the evidence every fact necessary to establish a liability on the part of the defendant before she can recover; and if the plaintiff was guilty of any negligence that contributed to her injury she cannot recover. (Krieger vs. A. E. R. Co. 242 Ill. 544.)

We recognized the general rule that the negligence of the defendant company and the question of contributory negligence of the plaintiff is usually a question of fact for the jury. Where reasonable minds might reach different conclusions from the evidence offered together with all justifiable inferences to be drawn therefrom, the appellate court should not reverse a case because of the conflict of evidence, unless an examination of the record discloses the plaintiff in the case has not proven her case by the greater weight or preponderance of the evidence.

After carefully examining the evidence in this case this court is of the opinion that the plaintiff has not proven by the preponderance of the evidence the negligence of the defendant company, nor that she by her own conduct was not guilty of contributory negligence at the time of the accident.

During the cross-examination of Mrs. Hazel Rettle the plaintiff in the case, it is contended by the appellant in the case "that she sat upon the witness stand and cried loudly, volubly, and continuously in the presence of the jury until it became necessary to withdraw the jury from the court room until she had subsided." It is admitted by



counsel for the plaintiff that Mrs. Rottlo did sit upon the witness stand and was crying in the presence of the jury, and at his suggestion she was permitted to leave the court room until she could compose herself.

While the plaintiff, Mrs. Rottlo was absent from the court room the defendant made a motion to withdraw a juror, and continue the case and for time to present an affidavit setting up the facts which had occurred in the presence of the jury. The plaintiff's counsel objected, because he had suggested the withdrawal of the jury so that Mrs. Rottlo could compose herself. The motion of defendant's was overruled.

We are of the opinion that it makes no difference at whose request the jury retired while Mrs. Rottlo was given time to regain her composure, as the damage, if any, had been done while the acts complained of were in the presence of the jury. Counsel for appellee claim that there was no harm done, or error committed by the trial court in refusing to grant the request of the defendant in withdrawing a juror and continuing the case. They cited the case of C. E. R. R. Co., v. Meech, 183 Ill. 317. The appellant cites the same case as authority supporting their proposition that the court did commit error.

In the Meech case (supra) the question arose on an instruction offered and refused by the court, instructing the jury to disregard certain matters that had occurred in their presence, etc., and the court held that under the circumstances in that particular case that the failure to give the instruction was not reversible error; but, in the next paragraph of their opinion say the following:

"It is finally urged that the Superior Court erred in not granting a new trial for prejudicial conduct of the plaintiff in the presence of the jury. This contention has reference to the transaction to which allusion



has just been made. The fact that a plaintiff or defendant, or witness or any other person, suddenly swoons or faints, or gives vent to hysterical exclamations, or breaks down with hysteria, does not call for the granting of a new trial, ---and especially so when the party claiming to be prejudiced does not ask for the withdrawal of a juror and continuance of the case, but lies by and speculates upon his chance for a verdict. It is hardly probable that the occurrence in question affected, in any way, the verdict. If it had any effect, it was as likely to prejudice as to help the case of the plaintiff. Of course, if it appeared that the dramatic occurrence that took place in the midst of the trial was intentional and for an improper motive it would afford ground for setting aside the verdict. But here the affidavits submitted at the hearing of the motion indicate quite clearly that the plaintiff's conduct was not feigned, but was owing to the mental strain of several days of trial acting upon a weak and exhausted physical condition and a shattered nervous system."

In the Lakin case vs. South Side Elevated Railway Co., 178 Ill. App. page 176, a similar question was discussed by the Court and they used the following language: "If counsel apprehended that the incident would operate to the prejudice of the appellant, they might with propriety have requested the withdrawal of a juror and a continuance of the case, or requested a proper instruction on the subject, but the record discloses that they wholly ignored the incident until they interposed their motion for a new trial."

In the case at bar, we think the defendant at the proper time made its motion to withdraw the juror and continue the case. Litigents have the right to have their cases submitted without any outside influence or show of emotion from the witnesses, or parties to the suit; and while we would not consider it to be reversible error, if this was the only point involved in the case, we are of the opinion that the defendant was prejudiced by the acts of the plaintiff while on the witness stand, and its motion should have been sustained.

Counsel for the plaintiff for the plaintiff complains of defendant's treatment in the cross-examination of the plaintiff, and that that caused her to become exhausted,

etc., and that the defendant should not be allowed to take advantage of something they caused themselves.

On examination of the record it does not support the contention of the attorney for the plaintiff as it discloses that the cross-examination consists of seven typewritten pages before the withdrawal of the jury, and a great portion of those seven pages are very short questions and answers, so the whole could easily be put on three or four regular typewritten sheets of paper, while in the Meech case (supra) the record shows that the plaintiff had been on the witness stand for several days.

This Court sitting as a Court of review of the facts and the law in the case is of the opinion that the judgment of the Circuit Court of St. Clair County should be reversed and the case remanded.

REVERSED AND REMANDED.

Not to be reported in full.

FILED

FEB 1 1929

Robert S. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS.
APPELLATE COURT,
FOURTH DISTRICT.

OCTOBER TERM, A. D. 1928.

TERM NO. 6.

AGENDA NO. 9.

THE KANSAS & SIDELL
RAILROAD COMPANY,
Appellant.

VS.

B. F. PARKER, Trustee
State Bank of Yale,
Illinois, YALE SHORT LINE
RAILROAD COMPANY and
A. M. HUNSAKER,
Appellees.

251 I.A. 628⁵

APPEAL FROM THE CIRCUIT
COURT OF JASPER COUNTY,
ILLINOIS.

Wolfe, J. This appeal has been made to determine the propriety of an order of the circuit court of Jasper County sustaining a motion to dismiss and strike from the files of that court a bill of review filed by the appellant to set aside a decree of foreclosure, and a sale made thereunder, entered in that court at the April Term, 1927. The motion is in writing and sets up four causes as grounds for the dismissal and striking of the bill as follows: 1. That the bill of review seeks to set aside a decree entered by the court at a previous term because of newly discovered evidence and matters dehors the original record, and could not be filed without leave of court. 2. That the bill was filed without leave of court and without presenting any petition, affidavits or evidence, showing any proper or legal right to file the bill. 3. The bill does not rely exclusively on errors apparent on the face of the record or any allegation of fraud, sufficient to sustain the bill, but recites matters of fact which have come about since the entry of the fore-

closure decree, and wholly outside the record, and relies thereon to set aside and reverse said decree. 4. Said bill does not show sufficient or legal cause for vacating said decree.

The motion was allowed and the bill was dismissed for want of equity. Our Supreme Court has held that under the chancery practice in this State, such a motion may be properly made by a defendant to a bill of review. The motion is treated as a general demurrer, admitting all facts well plead in the bill, and the bill will not be dismissed, upon the motion, unless it is clear no amendment can help the bill. *Grimes, v. Grimes*, 143 Ill. 550; *Lavin v. Commissioners of Cook County*, 245 Ill. 496. We draw the conclusion from the argument presented by the attorney for the appellee in this case, that he admits that the filing of the above mentioned motion has resulted, under the technical rule of pleading, in such admission of the facts pleaded in the bill. In justice to counsel for appellee, we further state that he wishes to be understood as firmly denying the actual commission of the serious and grave acts of fraud charged against him by the allegations of the bill. And, of course, it will be understood that this court is not in this opinion passing upon the merits of the bill, but our attention is confined to the question if the bill on its face, after motion made to dismiss, presents enough to call for an answer, also whether it was properly filed without leave of Court.

It is the contention of the appellee that the bill requests a review upon the ground of newly discovered evidence united with and accompanied by charges of fraud in obtaining the decree, and that leave of court was



necessary before the bill was filed. Appellant's position is, that the bill is of a two fold character asking for a review of errors appearing on the face of the decree and for fraud impeaching the decrees, and, the bill not being based on any averment of newly discovered evidence, leave of court was not necessary before filing the bill. The law, relative to the necessity of obtaining leave of court to file a bill of review, is stated in the case of Harrington vs. County of Peoria, 262 Ill. 42, where our Supreme Court says, "A bill of review for error apparent upon the face of the record or to impeach a decree for fraud may be filed without leave, but leave of court must be obtained before the filing of a bill of review for newly discovered evidence; and such leave is also necessary where the averment of newly discovered evidence is united to or accompanied by a charge of fraud in obtaining the decree or united with allegations as to errors of law on the fact of the record." And in the case of Griggs vs. Gear, 3 Gilm, 2, it is stated that of necessity there may be a bill filed seeking the review of a former decree partaking both of the character of a bill for errors apparent, and of an original bill in the nature of a bill of review seeking to reverse a former decree for fraud, both of which may be filed without the leave of Court.

Bearing in mind the respective constructions of the bill by the appellant and the appellee and the law applicable to each of these interpretations of the bill, a summary of the bill will now be stated. The bill for review, with the exhibits attached thereto, is very lengthy and only those parts thereof which are material to an understanding of this decision will be given. The bill is brought by the appellant, The Kansas & Sidell Railroad Co., and a judgment creditor of the mortgagor, the Yale Short Line Railroad Co., against B. F. Parker, trustee, the State Bank of Yale, Yale

Short Line Railroad Co., and A. M. Hunsaker. The bill alleges that B. F. Parker, trustee, and the State Bank of Yale, two of the appellees herein, on about March 30, 1927, Filed in the Jasper county circuit court their bill for the foreclosure of a mortgage executed by the Yale Short Line Railroad Co., securing ten promissory notes of \$1,000.00 each. That appellant as a defendant in said suit demurred to the bill which demurrer was overruled, and the appellant filed a plea and an answer toapart of said bill; that a demurrer was sustained to the plea and the answer was regarded as an answer to the whole bill; a replication was filed to the answer and thereupon the cause stood in said court for hearing. That on or about April 20, 1927, being the date when the demurrer to the plea was overruled, it was agreed between W. E. Isley, the solicitor in the foreclosure suit, and the attorneys for the Kansas & Sidell Railroad Company, that the said Isley would notify and advise the attorneys for the appellant of the time when said cause would or could be heard by the court; and that one of the attorneys for the appellant requested the clerk of said court to notify said attorneys of the time when said cause would be heard or set for trial; and this attorney also requested the clerk of the circuit court to notify such attorney when the cause would be set for a trial or heard. That on April 27, 1927, and prior to the time that a decree of foreclosure was entered in said cause, the Illinois Commerce Commission of the State of Illinois had issued its citation summoning the Yale Short Line Railroad Company to appear before said Commission in Springfield on May 17, 1927, to show cause why said mortgage had been issued without the approval of the Commission first had. And that said Isley, in said proceedings, as attorney for the complainants in said fore-



closure suit and also as attorney for the Yale Short Line Railroad Co., filed his motion and affidavit for continuance of said cause and alleged that the State Bank of Yale had financed said railroad to the extent of \$10,000.00 and was the holder of said notes and mortgage. That notwithstanding said proceedings before said commission and said agreement entered into between said attorneys, and without notifying the Clerk of said cause being set for hearing, and the same not being set for hearing, the said Isley, well knowing that said mortgage was being so investigated by said Commission, and well knowing that he had not notified or advised said attorneys as to the day when said cause was set for trial, or that he expected to call said cause up for hearing, and well knowing that he had not notified the clerk of said court of his desire to take up said cause or to conduct a hearing before the court, called up said cause and offered some proof concerning said mortgage and as a result thereof certain orders were made by the court and on the 19th day of May, 1927, the decree of foreclosure was filed with the clerk of said court.

That the said Isley and the said complainants in the foreclosure suit had full knowledge of an interlocutory order entered by said Commission on the 18th of May, 1927, finding that the approval of said Commission had not been given to issue said notes and mortgage; and the Commission ordered its secretary to transfer the records in the matter to the Attorney General of the State of Illinois with the request that he take such steps as might be necessary to enforce the law in the matter. This interlocutory order appears verbatim in the bill. That said Isley and complainants had knowledge that the attorneys for the appellant were not aware that said cause was to be called for hearing and

that the calling of said cause was deliberately done by said Isley for the purpose of obtaining a decree in the absence of counsel for appellant.

That the attorneys for the appellant on April 21, 1927, wrote a letter to the judge of said court saying that they expected to make a defense to the foreclosure suit and would be ready to try the case some time after the first of May, A copy of this letter also appears in the bill. That although attorneys for appellant used due diligence, they had no information; nor were notified, that said cause was heard, or that a decree had been rendered until about August 15, 1927.

Substantially the bill avers further that on August 15, 1927, the matter of the investigation of the validity of said notes and mortgages was still pending before said Commission and a final order declaring the same void was made by the Commission on or about March 16, 1928. Paragraphs 27, 80 and 81 of Chapter 111 2/3 of the Revised Statutes of Illinois are copied in the bill with an allegation that such paragraphs were in force at the time of the execution of the notes and mortgages. That the notes and mortgages were never approved by the Interstate Commerce Commission of the United States, and that no attempt was ever made to secure such consents of either said Commissions; and that the bill to foreclose the mortgage does not allege such approval of either of said Commissions; nor does the decree find such approval; that in the foreclosure decree the circuit court found that the Illinois Commerce Commission was estopped from denying said mortgage invalid because of its approval of certain reports made by the Yale Short Line Railroad Company to the Commission, and that the circuit court



usurped the jurisdiction of the Commission; that immediately upon receiving a certified copy of said final order appellant made preparations to file the bill of review.

The bill alleges that when the foreclosure decree was rendered, appellant was a judgment creditor of the Yale Short Line Railroad Co.; that under the decree the property mentioned in the mortgage was sold by the master in chancery to the State Bank of Yale, a complainant in the bill to foreclosure. And that by reason of the fraudulent practices of said Isley and the complainants in the foreclosure suit, the appellant was deprived of the right to a hearing in said foreclosure suit upon the issues joined, and was deprived and hindered and prevented from appearing and making a defense as a judgment creditor in said cause, which fraud was perpetrated by said Isley and one E. M. Wimmn, President of said Yale Short Line Railroad Company, and also President of the State Bank of Yale; and that the interests of said railroad company and said bank and B. F. Parker, the trustee named in said mortgage, were the same, that is to defraud the appellant of its just rights to appear and defend in said foreclosure proceedings. That by reason of the fraudulent practices of said parties and particularly the said Isley, the appellant has been prejudiced and aggrieved. That upon a hearing upon the bill, the decree of the court entered on May 19, 1927, and the sale held by virtue of said decree, and any and all proceedings had by virtue of said decree, be set aside and that said case entitled B. F. Parker, trustee, and the State Bank of Yale, Illinois, vs. the Yale Short Line Railroad Company, A. M. Hunsaker and Kansas & Sidell Railroad Company, No. 2399, shall be set aside for a day set to be heard upon the bill of complaint, the answer thereto and the replication to such answer, and the appellant

be permitted to appear and make a defense to said bill.

Attached to the bill and made a part thereof are 7 exhibits, the first is the bill to foreclose the mortgage which is in the usual form. The bill to foreclose is brought by B. F. Parker as trustee named in the deed and State Bank of Yale against the Yale Short Line Railroad Company, A. M. Hunsaker and the appellant. The property described in the bill and mortgage is all right of way of railroad, including tracks, rails, depots, all the improvements belonging to the railroad and situated in Clark, Cumberland and Jasper counties, Illinois. That the appellant has or claims some interest in said property under an alleged judgment recently taken in the circuit court of Clerk county, Illinois, but which said judgment is fraudulent and void and subsequent to and junior to the lien acquired by the orators of the bill. Attached to the bill are the notes and mortgage. Exhibit 2 is the summons issued in the foreclosure suit. Exhibit 3 is the demurrer to the bill of foreclosure and which was sustained by the court. Exhibit 4 is the answer of the appellant to the bill of foreclosure. This answer denies that its judgment against the Yale Short Line Railroad Company is void and fraudulent and that it is a junior lien to the lien of the mortgage; denies that the notes and mortgages mentioned in the bill are valid and subsisting obligations and liens; also denies that said notes and mortgage were legally executed and delivered as alleged in the bill for any purpose permitted by the statute governing the execution of the notes and mortgages by public utilities; denies that the president and secretary of said Yale Short Line Railroad Company had authority to execute the notes and mortgages; also that the mortgage was executed on authority, consent or approval granted by the Illinois Commerce Commission or the Interstate Commerce Commission or with the approval of either said commissions. Exhibit 5

is the plea to the bill and to which a demurrer was sustained. Exhibit 6 is the decree of foreclosure pro confesso and recites that the cause coming on for hearing on May 16, 1927, upon the bill and the answer and that the defendant (the appellant) had been duly advised that said cause would be set for trial during the present week, it is ordered that the hearing on the bill, the answer and replication be set for Wednesday, May 18, 1927, at the hour of Ten o'clock in the forenoon. And the cause being called for trial on May 19, 1927, the Court upon hearing testimony found the allegations in said bill to be true as therein set forth and the equities of the case with the complainant. The decree then recites the main provisions of the notes and mortgages. Also that the judgment lien of the appellant on the property of the mortgagor is subject to the lien of the mortgage, and recites that the court makes no finding as to whether said judgment is valid or void. That said notes and mortgages were given by the president and secretary of the mortgagor under authority given to them by the mortgagor; that said notes and mortgage were given to obtain money for the purpose of making necessary repairs by said railroad company and to take up notes then outstanding; and that the notes secured by the mortgage when issued were to be paid within one year after their execution. That the Illinois Commerce Commission was duly notified of the execution of said notes and mortgages in the annual report of the Yale Short Line Railroad Company for the years 1921 to 1926 inclusive, and said mortgage indebtedness was reported by said mortgagor to said Commission and said Commission is equitably estopped from declaring such mortgage or notes void and that the Kansas and Sidell Railroad Company cannot lawfully or equitably question the validity of said notes and said mortgage on any

of the grounds alleged in its answer. The decree finds the amount due the mortgagee and orders the premises sold to satisfy the indebtedness. Exhibit 7 is the final order of the Illinois Commerce Commission, dated March 6, 1928, declaring said notes and mortgage void.

The bill for review does not allege that since the rendering of the foreclosure decree new matter has been discovered in consideration of which the decree should be reviewed. The validity of the notes was put in issue by the answer. The Court in its decree finds that the notes are payable within one year after their execution. Section 23 of Chapter 111 2/3 Revised Statutes of Illinois provides that every note or other evidence of indebtedness, of a public utility, not payable within 12 months and issued without an order of the Illinois Commerce Commission authorizing the same then in effect shall be void. A bill of review cannot be made to function as an appeal or writ of error. *Regner vs. Hoover*, 318 Ill. 169. We do not think that the allegations of the bill setting forth the final order of the Illinois Commerce Commission deciding the notes and mortgages void was new matter in pais, discovered since the foreclosure decree, which could be the basis for a bill of review. *Hoffman vs. Knox*, 50 Fed. 484; *Scotten vs. Littlefield*, 235 U. S. 407, 59 L.Ed. 289.

The bill does not allege specifically that the decree should be a review for error apparent by reason of the fact that the Illinois Commerce Commission was not a party to the suit of foreclosure and therefore could not be bound by the finding of the court, in the decree, that it was estopped to deny the validity of the notes and mortgages.

A bill of review should state the point in which the party exhibiting the bill conceives himself aggrieved by it. *Bruschke vs. N. Chicago Schuetzen Verein*, 145 Ill. 433.

The basis of the bill of review is the allegations of fraud impeaching the decree and leave of court was not necessary before filing the bill. The allegations of fraud in the bill are specific and, without further comment or discussion, we held that they state sufficient ground to call for a review of the foreclosure decree.

The order of the circuit court dismissing the bill or review for want of equity is reversed and the cause remanded to the circuit court of Jasper County for further proceedings not inconsistent with this decision.

Reversed and Remanded.

Not to be published in full.

FILED

FEB 1 1928

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
OCTOBER TERM, A. D. 1928.

TERM NO. 24.

AGENDA NO. 27.

CREWS STATE BANK AND TRUST CO., :
Appellee,

VS.

LAURA B. HUMES,
Appellant.

251 I.A. 629
: APPEAL FROM THE CIRCUIT
: COURT OF EFFINGHAM COUNTY.

WOLFE, J.-

This bill was filed on March 9th, 1927, to the October Term by Appellee against Jess Humes and Laura B. Humes (husband and wife) and also against W. R. Humes, who is their son, seeking to have declared null and void as to appellee a certain warranty deed dated December 16, 1926, executed by Jess A. Humes, husband, to Laura B. Humes, wife. The consideration expressed in said deed being love and affection and one dollar. Said deed conveyed an undivided one half interest in and to 163 acres of land in Effingham County and several lots and parcels of land in the village of Mason, Effingham County, Illinois.

In November, 1925, the defendants, Jess A. Humes and W. R. Humes, gave the Bank their note for \$400.00. and at that time the Bank held their other note for \$575.00. Various renewals and payments were made, and finally said indebtedness was merged and consolidated in the \$925.00 note sued upon. Judgment for \$1019.88 and costs was taken in the Circuit Court in vacation against Jess A. Humes and W. R. Humes on June 5, 1927, on the promissory note of \$925.00 for money borrowed from said Bank by defendants

J. A. Humes and W. R. Humes.

The bill alleges the taking of the judgment, the issuing of an execution and return; and also states that the deed made by J. A. Humes, husband, to Laura B. Humes, wife, was a voluntary conveyance without consideration and made to defraud appellee and prevent it from collecting its note and judgment; that said deed was made with the private understanding and agreement between the parties, and that the same belonged of right and should inure to the benefit of the defendant, J. A. Humes, and is null and void and in equity and good conscience should be applied to the satisfaction of said judgment. The bill recites that the indebtedness existed prior to the making of the conveyance and prays for a discovery of assets and that the conveyance be declared null and void as a fraud upon appellee.

Defendant J. A. Humes answered the bill under oath that he had no money or property of any kind or nature; admits the execution of the deed to his wife, Laura B. Humes, but denies that the deed was made for the purpose of defrauding the complainant, but that the deed was executed because the property described in the bill and deed was the property of his wife, Laura B. Humes, and that said property had been paid for by her out of money which she received from her father's estate, the one half interest of which had been held by this defendant for the said Laura B. Humes; that the title to a portion of said property was conveyed to Laura B. Humes by her father, W. H. Martin; that a portion of said property was purchased by money which the said Laura B. Humes had as her own personal property; that defendant, Jess A. Humes, had no interest in the property; that he paid no money to the purchaser thereof and in equity the property belonged to Laura B. Humes, his wife, and that the value of said property had been deducted from her

inheritance.

Upon the filing of the answer of Josse A. Humes, complainant took leave to amend the bill, which amendment recited inter alia, that the indebtedness evidenced by the promissory note upon which judgment was rendered was contracted prior to the date of said conveyance; that the land conveyed was not the homestead of either defendants and that for to-wit; ten years prior to the making of the deed in question, the fee simple title to an undivided one-half interest of the real estate described in said deed and bill was of record in the recorder's office of Effingham County in the name of the defendant, J. A. Humes; that upon the strength of said record title and upon the representations of defendant J. A. Humes to the plaintiff that he was the owner of said real estate the said credit was obtained; and also recites that the defendant, Laura B. Humes, was personally present at the Bank of the complainant on divers occasions and assisted in the negotiations concerning this indebtedness between the complainant and defendants, J. A. Humes and W. R. Humes, and had full knowledge of the money loaned; that she represented to the bank that defendant J. A. Humes, was the owner and possessor of real estate and was good financially for said indebtedness; that by the conduct, acts, and representations of Laura B. Humes, the complainant was further induced to believe that J. A. Humes was the owner of the real estate to which he then held title of record and further induced the complainant to extend the credit represented by the promissory note sued upon.

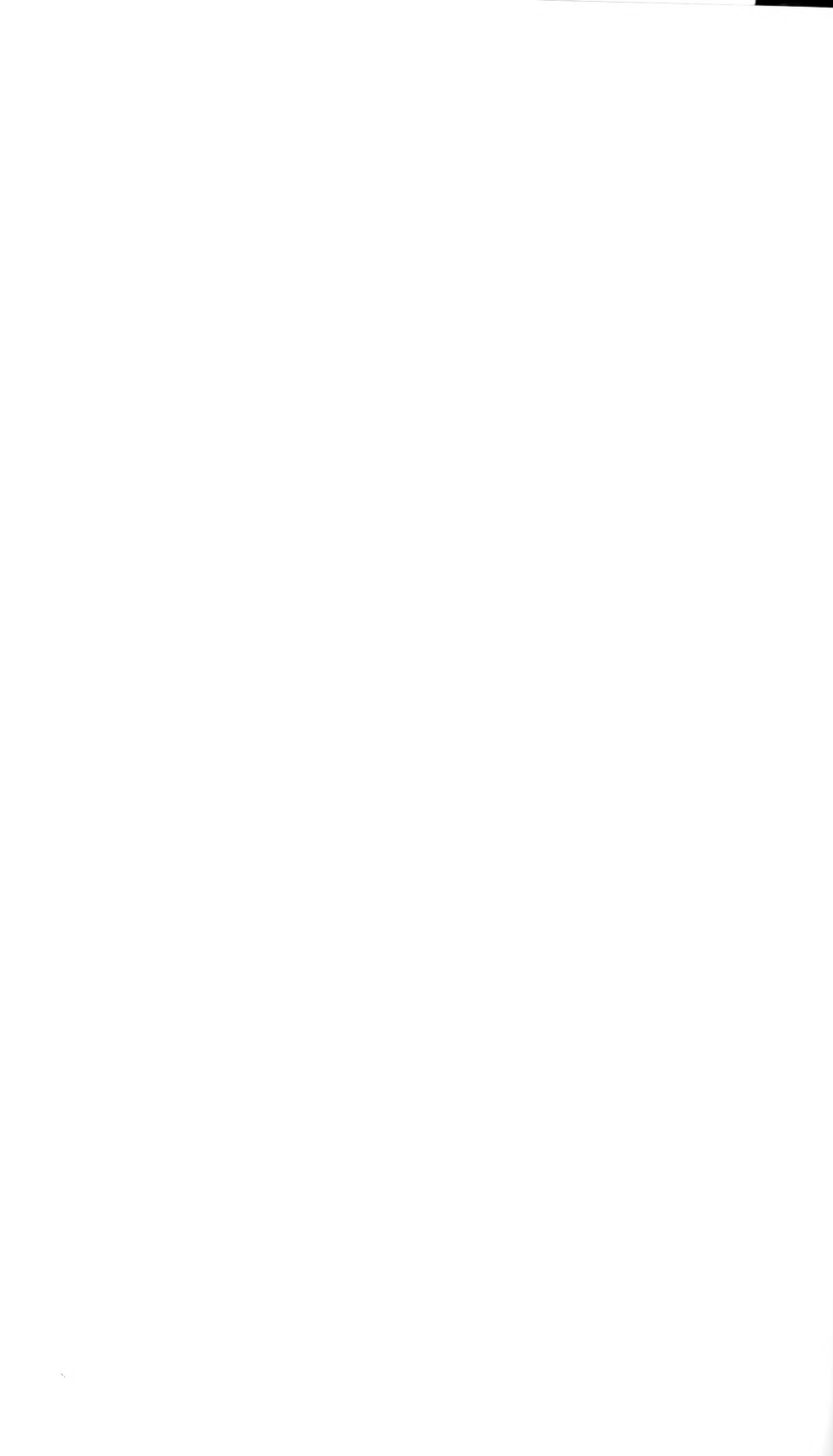
The sworn answer of Laura B. Humes to the billas amended recites that she has no money or property in her hands belonging to J. A. Humes; that she



is not a party to the judgment; she admits the execution of the deed for the premises described; denies that said deed was made for the purpose of defrauding complainant, stating that said deed was made for the reason that the property therein described was in equity her own property and had been paid for out of money which she received from her father's estate; denies any representations about the financial responsibility of J. A. Humes; also denies that she in any manner by acts, or conduct induced the Bank to make loans to the defendants or renew and extend the payment on said note.

The theory of the original bill is that the conveyance was voluntary between husband and wife and therefore void as against appellee whose debt was in existence prior to the making of the deed in question. The theory of the amendment of the bill is that a legal title was held in trust by Jess A. Humes for the benefit of his wife, Laura B. Humes; then that her acts, representations and conduct ostop her from asserting her claim to title as against the appellee. The defendant answered and tried the case on the theory that the property conveyed in said deed was trust property, the title being held by Jess Humes for the benefit of his wife.

The Court by its decree, found that the deed from J. A. Humes to Laura B. Humes, is wholly voluntary and without any consideration in fact, and was executed and delivered for the sole purpose of defeating the complainant in the collection of its judgment and orders the payment of said judgment by J. A. Humes and W. R. Humes within thirty days. In case of failure, execution to be awarded, and authorized levy upon the land described in the decree for the payment and satisfaction of said judgment, interest and costs; orders W. R. Humes and J. A. Humes to pay the costs of this proceeding, and if the sale of the



premises be not sufficient to pay said judgment, interest and costs, and the costs of this suit, that the complainant have further execution against the defendant Laura B. Humes.

Said Laura B. Humes excepted to said finding and decree and has appealed to this Court.

It is the contention of the appellant that there was improper evidence admitted by the Court on behalf of the complainant and that the evidence in the case does not justify the Chancellor in finding that the deed was made without consideration and in fraud of the rights of the complainant.

It is not necessary that direct evidence be introduced to show that the conveyance is fraudulent as to the third party, but any circumstances that tend to throw any light on the subject is competent evidence. The testimony of James Crews concerning what J. A. Humes told him concerning the ownership of the land described in the bill and the testimony of D. B. Crews as to conversation with J. A. Humes and Jerome Webb were all concerning facts pertinent to the issue and were properly admitted in evidence.

It is not material in this case whether the evidence complained of as objectionable was admissible or not, for there is enough competent evidence in the case to justify the Chancellor in finding that this transfer was fraudulent as to the complainant; and, as stated in *Krieling vs. Northupp*, 215 Ill. 195: "The case was heard by the Court without a jury, and as to the evidence which was admitted, to which objection was made the rule is: That no improper or immaterial evidence will be presumed to have influenced the Court in reaching a decision where there is sufficient proper evidence to justify the judgment." (*Atwell Printing & B. Co., vs. Prairie Farmer Publishing Co.*, 246, p 100; *Lynn vs. The Western Pacific R. R. Co.*

It is objected by the appellant that the Court improperly admitted in evidence the judgment in favor of the Appellee as against W. R. and J. A. Humes, as against the appellant, she not being a party to the judgment and her deed having been filed for record prior to the entry of the judgment. The judgment was competent evidence as showing that appellee was a creditor of J. A. Humes and entitled as such creditor to attack the conveyance made by J. A. Humes to his wife. It was so charged in his bill of complaint and the burden was upon him to establish this averment, and we think one of the requisites before the bill would lie. The remedies at law should be exhausted. (Martin v. Duncan, 121 Ill. p. 120; Clayton v. Clayton, 250 Ill. p. 432; Cotes, vs. Bennett, 183 Ill. p. 82.) The evidence shows that Mrs. Humes was aware of the fact that her son and husband were indebted to the complainants' bank. Also that she had represented to the Bank that her husband as security on the note was financially good; that he owned property.

The law is that if there is a controversy between the husband and a judgment creditor, it is a material circumstance, if the wife has permitted the husband to hold himself out as owner of the property, and thereby bring credit on the strength of such ownership. (Hackett vs. Bailey 86 Ill. p. 77.)

It is stated in Hauk vs. Van Ingen, 1926 Ill. p. 36, "If a wife permits her husband to take title to her land and hold himself out to the world as owner of it, and contracts a debt upon the credit of such ownership, she can not afterwards, by taking title to herself, withdraw them from the reach of his creditors and thus defeat their claims. A claim made by the wife against the husband and first put in writing when his liabilities begin to jeopardize

his creditors, his evidence should always be guarded with watchful suspicion and when attempted to be asserted against creditors upon the evidence of the parties alone uncorroborated by other proof, will be rejected at once unless their statements are so full and convincing as to make the fairness and justice of the claim manifest."

From a review of the evidence in this case we are of the opinion that the Chancellor properly found that the deed to Laura B. Humes from J. A. Humes was without consideration and void as to the complainant in this case.

From an examination of the decree it cannot be told whether the order is to sell the one-half interest in the real estate fraudulently conveyed by J. A. Humes to Laura B. Humes, or the whole of the tract. The decree provides that the defendant W. R. Humes and J. A. Humes pay the costs of the proceedings to be taxed by the Clerk of the Court, and if the proceeds from the sale of said premises are not sufficient to pay said judgment, interest and costs of the suit, that the complainant have further execution for same against the defendant Laura B. Humes.

There should be no personal judgment against Laura B. Humes for the amount of the Judgment and costs of the former suit, the only property of Laura B. Humes that would be subject to this suit would be the one-half interest conveyed by her husband to her. The decree in this respect is erroneous and should be reversed and remanded to the trial Court for correction.

The judgment of the Circuit Court of Effingham County is hereby Affirmed in finding that the transfer of the property in question from J. A. Humes to Laura B. Humes is fraudulent and void as to the complainant; but, as to the execution against Laura B. Humes and the sale of the entire property it is hereby reversed and remanded to the trial court to have the decree corrected so that it shall conform to the finding of this Court. Appellant and Appellee to each pay one-half the cost of this appeal.

RECORDED AND INDEXED WITH CORRECTIONS TO CORRECT

FILED

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Robert Nick
CLERK OF APPELLATE COURT
FOURTH DISTRICT OF ILL.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1928.

TERM NO. 36.

AGENDA NO. 39.

ROBERT NICKLICH,
Appellee,

VS.

JOHN SOURIS,
Appellant.

:
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: APPEAL FROM THE CIRCUIT
:
: COURT OF ST. CLAIR COUNTY.
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WOLFE J.-

This is an appeal from a judgment of the Circuit Court of St. Clair County against the appellant, John Souris, in favor of the appellee, Robert Nicklich, for damages sustained by him arising out of an alleged assault made by appellant on September 30, 1927. The declaration alleges that appellant struck appellee with a club and with his fist and kicked him, in a fight which occurred between them on West Main Street, Belleville, Illinois, as a result of which appellee sustained a fracture of the skull and now suffers great pain, is afflicted with headaches, dizzy spells and is permanently injured.

Appellant pleaded not guilty and filed a special plea in which he alleged that any assault made by him on appellee was in his necessary defense. The jury assessed damages at Six Thousand (\$6,000) Dollars. Judgment was entered upon the verdict and this appeal follows.

The first assignment of error of the appellant is that the verdict is contrary to the evidence in the case. An examination of the evidence discloses that there is only one thing that is not in dispute, and that is that the plaintiff and defendant had a fight and that the plaintiff

was injured during the fight. Who was aggressor, and who struck the first blow is in dispute. It is difficult to decide where the preponderance of the evidence is. The jury, by its verdict, has found that the appellant was the aggressor and should respond in damages for the assault that he made upon the plaintiff.

While the evidence is nearly a hopeless conflict in regard to material matters we do not feel disposed to reverse the case for the reason that the verdict is contrary to the evidence, provided the case has been fairly presented to the jury before the trial Court.

The second objection by the appellant is that the Court gave to the jury improper instructions relative to the burden of proof in the case. His contention is that the declaration charges the defendant with a felony; therefore, the same rule as if he was being tried for a felony prevailed and before the plaintiff would be entitled to recover, he should prove his case by the evidence beyond a reasonable doubt, and cites *Rost vs. Noble & Co.*, 316 Ill. p. 371. An examination of this case does not support the contention of the appellant, but lays down the rule that it is only necessary for the plaintiff to prove his case beyond a reasonable doubt when the declaration itself charges the defendant with a felony, and overrules the old rule that was in vogue relative to these cases that applied to misdemeanors the same as felonies. The same rule has been laid down in the *People vs. Small*, 319 Ill. 481, and *Glascock vs. Gerold*, 199 App. 134; *Burgiel vs. Aniol*, 218 Ill. App. 466.

Mr. Curt Lindauer, assistant State's Attorney for St. Clair County, was called as a witness on behalf of the plaintiff and was, over the objection of the defendant, permitted to testify to a conversation that had taken place

between the defendant and the witness Lindauer in the office of the Police Magistrate Wagner in the City Hall shortly after the fight had occurred between the plaintiff and defendant. Mr. Lindaur testified that he had told the defendant that the plaintiff might die, and the defendant answered, "That he hoped that he did," or expressed the wish that he would die. No doubt his evidence was admitted for the purpose of showing feeling that existed between the plaintiff and the defendant. They were rivals in business and evidently the fight started over some matters pertaining to which one would have the better stand for the displaying and selling of their wares. There is no evidence of any ill feeling prior to time of fight which would lead to such an occurrence.

The defendant claimed that he acted only in self defense. If this claim was supported by the evidence the plaintiff could not recover in the case, and it is immaterial what the feelings were between the parties after the fight was over, for if Mr. Souris really believed that he was the aggrieved party and had suffered injury at the hands of Mr. Nicklich he naturally would not be feeling kindly towards the plaintiff.

It has been frequently held that in an action for assault and battery such as is set forth in the declaration in this case if the proof shows that the act that occasioned the wrong is unlawful the intent of the wrongdoer is immaterial, the gist of the action being whether or not the complaining witness was unlawfully assaulted by the other party. This is the rule as laid down in Schmitt vs. Kurrus, 234 Ill. 582, and Nichols vs. Colwell, 119 App. 219.

The defendant in his testimony denies that he made such statements. At the time the alleged statements

were made the defendant was under arrest charged with the assault with intent to kill the plaintiff. The testimony of Lindaur, an official of the County--assistant State's Attorney--no doubt would have much weight before the jury. We are of the opinion that the Court erred in admitting Mr. Lindaur's testimony.

It is next contended that Mr. Johnson, the attorney for the plaintiff, made improper remarks before the jury during the course of the trial and asked improper questions for the purpose of prejudicing the case before the jury. The first complaint is where Mr. Johnson in addressing the Court before the jury said: "I want the Court to take cognizance of the fact that the defendant just now broke out in the statement in which he said, "This is no Court." Counsel for the defendant immediately objected to this remark and the Court very properly instructed the jury 'that he did not hear it, and if they did, to disregard it."

Later in the cross examination of the witness Stoekel this question was asked: "Didn't Raymond Kettler say to you yesterday morning when you talked to him that he had heard Souris say, "I will kill that son of a bitch" and if you didn't then say to Kettler that he should leave out that part of it? We think that the statement above referred to and the question asked by Mr. Johnson were highly objectionable and could have only one purpose in view, and that was the bearing it would have on the case before the jury.

In the case of the City of Centralia vs. Ayers, 133 App. page 294, the Court used the following language which we think is very applicable in this case: "The remarks of counsel in argument to the jury, to which objection was made and sustained, and of which complaint is now made, were highly improper and inexcusable, coming from counsel of ability, age and experience in the practice of the law. It

TERM NO. 36.

is the motive that deserves rebuke and where it is seen that the intended effect of improper remarks is to excite the passions or prejudice of the jury, neither the attorney nor his client may complain if the verdict is set aside for that reason alone."

It is the contention of the defendant that the instruction authorizing punitive damages was erroneous, because the declaration did not allege the assault was wilful or malicious. There are no authorities cited in support of this proposition, so that this Court will assume that there are no such authorities and we are not passing upon that point in the case.

Owing to the conflict of the evidence in the case and for the errors as pointed out in this opinion, the judgment of the Circuit Court of St. Clair County is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full.

FILED

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Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

OCTOBER TERM, A. D. 1928.

TERM NO. 37.

AGENDA NO. 18.

AGNES SANTHA, Executrix of
the Estate of STEVE SANTHA,
Deceased,

Appellee,

VS.

STEVE LASSLO,
Appellant.

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251 I.A. 629³

APPEAL FROM THE CIRCUIT

COURT OF MADISON COUNTY.

WOLFE, J.

Agnes Santha, executrix of the last will and testament of Steve Santha, her deceased husband, recovered a judgment in the sum of \$955.33 against Steve Lasslo, appellant, in an action of assumpsit in the circuit court of Madison county, and to reverse this judgment this appeal is prosecuted. It is the first and main contention of the appellant that the judgment is not supported by the evidence, and the trial court should have sustained his motion for a new trial on the ground that the verdict of the jury is against the weight of the evidence. The action was brought for money alleged to be owing to Steve Santha, by the appellant. The original pleadings consisted of the common counts, general issue and similiter. A motion therefor being granted, a bill of particulars was filed which specified two items or claims in amplification of the cause of action as follows: For cash money loaned by the said Steve

Santha in his lifetime to defendant Steve Lasslo, \$400.00. For an undivided one-half of his store account due to the defendant and the deceased, Steve Santha, arrived at by a settlement between said parties on the 31st day of December, 1923, \$753.16. A total of \$1,153.16.

To prove the first item of the bill of particulars, the appellee introduced in evidence, in addition to oral testimony a piece of paper on which there was written in the Hungarian language, and now translated as the same appears in the record, the following:

"Obligation:

Undersigned Obligation that Steve Santha in store brought \$400.00 or Four Hundred Dollars.

Steve Lasslo.

The signing of this document by the appellant and its delivery by him to Steve Santha during his lifetime, is undisputed. Counsel for appellee designates the document as a note or receipt and counsel for appellant objects to calling the paper a note, as he maintains it is a receipt and not a note. There were no instructions given to the jury, except forms of verdict, and at no time during the trial, so far as an examination of the record discloses, was the paper referred to as a promissory note. We consider the name given to the paper by counsel as of no great importance in this case, and hereafter it will be designated as exhibit 2.

The construction of exhibit 2 and the intention and purpose of Lasslo in executing and delivering it to Santha is a matter of dispute in this case. Both parties introduced parole evidence showing



the situation and relation of Santha and Lasslo at the time exhibit 2 was executed and delivered and also facts and circumstances connected with and surrounding the transaction of the giving of exhibit 2.

The witnesses are all Hungarians and evidently, we apprehend from a reading of the record, not conversant with the American language, and, in many instances, it is difficult to ascertain the meaning intended to be conveyed by the answers of the witnesses.

The evidence shows that for about sixteen years before December 31, 1923, Santha and Lasslo, under the name of Santha and Co., were partners conducting a grocery and a retail meat shop in Granite City. Prior to the marriage of Santha, in 1924, to the appellee, he was married to Julia Miehaus who had worked in the store of Santha and Co. for a period of three years before her marriage to Santha at a salary of \$20.00 per month. Julia Santha, first wife of Steve Santha, died in 1918, and after her funeral a woman cleaning the Santha home found in the bed tick two bank books in Julia Miehaus' name and showing a balance to her credit of about \$700.00. The \$400.00 referred to in exhibit 2 was money taken from the bank by Steve Santha, after the death of the wife Julia, by use of the bank books, or one of them. It is the contention of the appellant that although Santha paid the \$400.00 directly to Lasslo, the understanding between them was that it was paid into the partnership under the belief of both of them that Santha was making partial restitution of the \$700.00 which, they believed, Julia Santha had stolen from the firm during her time of employment in the store.



This is denied by the appellee who claims that the \$400.00 was a loan to Lasslo individually and made to him because of his threats to send Santha to jail unless he returned the \$700.00 to the partnership, under the false charge that it was stolen money. The evidence on this question is conflicting, as will subsequently appear.

The basis of the second item of the bill of particulars is a partnership settlement made and arrived at by Santha and Lasslo on December 31, 1923, when they took an invoice of the stock and fixtures in the store and dissolved the partnership. It is conceded that when this settlement was made there was due the firm from customers on accounts receivable the sum of \$890.85, cash on hand belonging to the firm, \$219.82; that the settlement then agreed upon provided that Lasslo was to retain the business, take the stock and fixtures, pay the debts of the firm, and the cash on hand should be equally divided between the partners. It is a matter of dispute between the parties in the case whether the evidence shows that Lasslo agreed to pay to Santha one-half of the amount due from customers of the firm, or if the understanding was that Lasslo was to pay one-half of such amount after its collection. There is no proof in the record who was to make the collections from the customers. It is also argued by the appellant, and denied by the appellee, that one-half of the cash on hand was paid to Santha by Lasslo. It is conceded by counsel for appellant that when the settlement was made, a list of customers' accounts was made out and set down in a book which was introduced by appellee as exhibit 1, and which

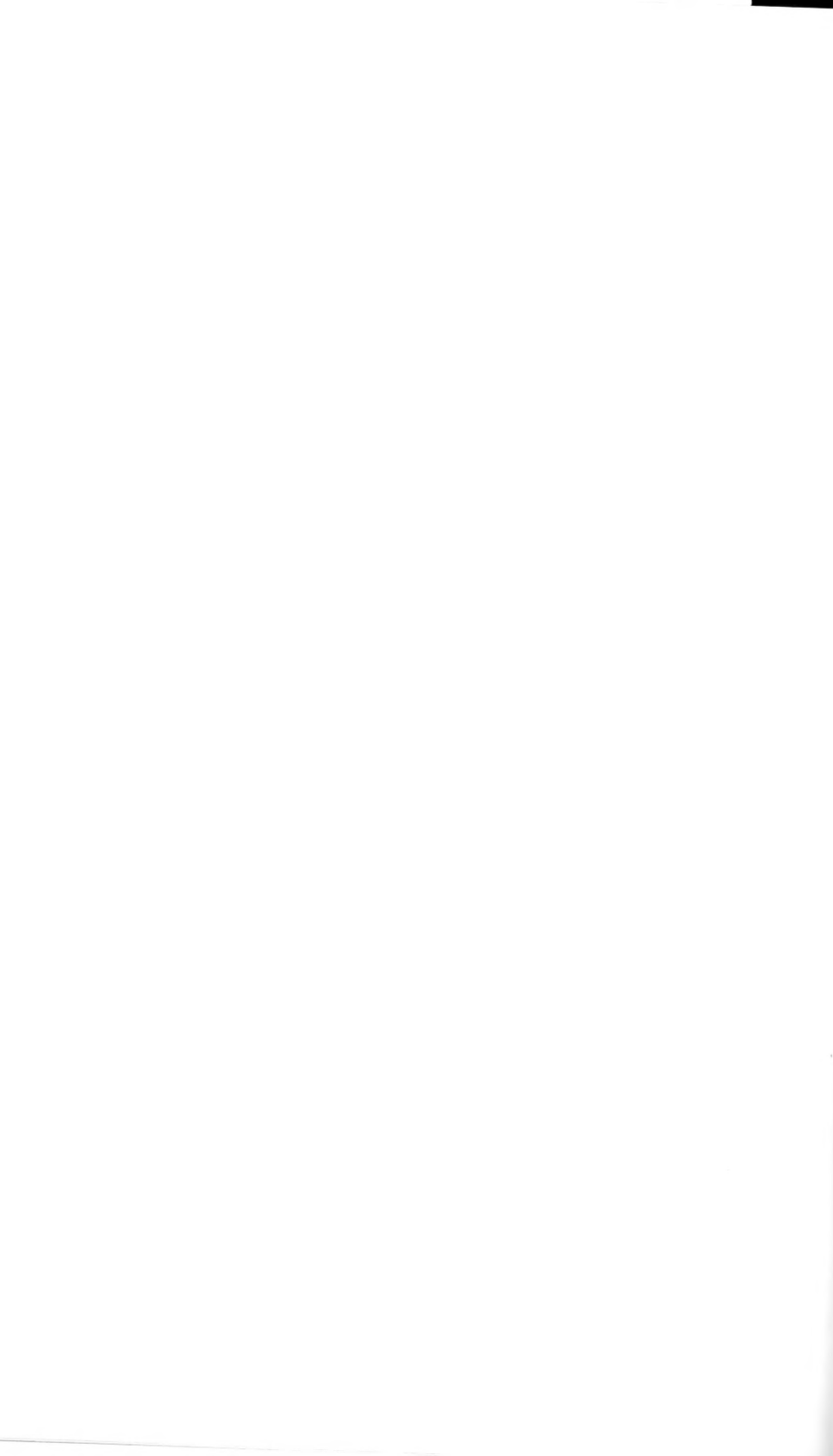


exhibit also shows, as a separate item, the cash on hand belonging to the firm.

Where questions of fact are passed upon by a jury properly and fully instructed as to the law, and a motion for a new trial is considered and refused by the trial court, the verdict will not be disturbed as against the weight of the evidence on appeal, unless it is clearly so on some essential issue involved. *Kumorowski vs. Armour & Co.*, 198, Ill. App. 306. In determining whether the verdict of a jury should be set aside, on error assigned that it is against the weight of the evidence, this court will take into consideration that the jury saw the witness and they were able to observe the witnesses when testifying, their frankness or prejudice and interest in the cause or the parties and were in a superior point of vantage to say who were entitled to the greater credence.

As to item two of the bill of particulars, the so called store account, we hold that it is supported by evidence in the case and the verdict of the jury is not opposed or contrary to the manifest weight of the evidence bearing on that claim of the bill of particulars. We have come to the conclusion from an examination of the evidence and printed statement of the case made by the counsel for appellant, that exhibit 1 was made up on December 31, 1923, the day when the partnership was dissolved. This conclusion is supported by the testimony of the witness Weiss; the witness Eppelly testified that he was present when "defendant's Exhibit A" was made. This defendant's exhibit A was not introduced in evidence and if it is in fact exhibit 1, then Weiss's testimony as to when

exhibit 1 was made is corroborated by Eppelly. If defendant's exhibit A is not exhibit 1 then Eppelly was not interrogated regarding the preparation of exhibit 1, and Weiss's testimony on this point is not contradicted except by the testimony of appellant. Appellant contradicted himself in his answers in reply to questions when he first saw exhibit 1, and the jury, we think, might rightly disregard his testimony on that phase of the case. The appellee and Weiss testified that the appellant admitted to them that he owed a total amount shown by exhibits 1 and 2, and this testimony is denied by appellant only. The credibility of these two witnesses, and the weight to be given to their testimony, was a question for the jury and their verdict we will not disturb, for error assigned in this case, unless it is manifestly against the weight of the evidence. The amount shown under exhibit 1 is one-half of \$890.85, due from customers, and one-half of \$219.82, the cash on hand, making a total amount due appellee of \$555.33.

The basis of the claim stated in item two of the bill of particulars, being the \$400.00 alleged to be due the appellee as represented by exhibit 2, is supported by the evidence of the appellee who testified that in her conversation with appellant on a farm he admitted being indebted to her to the extent of \$900.00 or more. Also, she testified, that in Weiss's office appellant admitted being indebted to her and that he would pay her; exhibits 1 and 2 were then in Weiss's office and held by him for collection from the appellant according to the evidence of appellee and Weiss. Weiss testified that he discussed with appellant the amounts due as shown by exhibits 1 and 2, and appellant said he had no money but would pay later on. He also testified that Santha refused to put the

\$400.00 in the bank for appellant's daughter, and that appellant borrowed the money from Santha. The testimony of Weiss relative to the loaning of the \$400.00 to the appellant is contradicted by defendant's witnesses, Mokay and Eppoly, who in substance both testified that Santha, during his lifetime admitted that the \$400.00 did not belong to him and he put it in the business of the partners. Exhibit 2 states on its face that the \$400.00 was brought into the store. Thus it does appear that the testimony bearing on the question whether the \$400.00 was given by Santha to Lasslo as a loan or paid by him to the partnership as a refundment for money taken by his former wife Julia is conflicting. The testimony of the three participants in the transaction of the payment of the \$400.00, and the reason therefor, is not available. This court has grave doubts as to its ability to weigh the evidence concerning exhibit 2 in a manner better than the trial judge and the jury which rendered the verdict. The evidence, we think, presents such a situation where reasonable and fair minded men might differ as to where the preponderance of the evidence lies. Such being the condition we deem it our duty to leave the verdict undisturbed on error alleged and assigned that it is against the weight of the evidence. City of Virden vs. Doyle. 123 Ill. App. 52; Linchan vs. Merton, 221 Ill. App. 70.

It is not the duty of this Court to set aside a verdict and judgment for the reason that the evidence seems to be equally balanced, or because it is doubtful whether the preponderance of the evidence is with the party upon whom the onus probandi rests, where no material errors of law have intervened, and there is nothing tending to show that passion, partiality or prejudice influenced such verdict. Chicago & A. R. Co. vs. Jennings, 120 Ill. App. 195.



Appellant also complains that he was not permitted to show how much money he had collected on the customer's accounts and that he had paid part of the amount so collected in payment of taxes and a note for both of which appellant and Santha were jointly liable. This testimony was excluded because the appellant was not a competent witness in his own behalf in the case under the statute. As the record does not show that such collections or payments were made after the death of Santha, we do not think the Court erred in excluding this testimony.

The judgment is for \$955.33, a total of the amounts due appellee as shown by exhibit 1 plus the \$400.00, and this judgment is AFFIRMED.

Not to be reported in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

OCTOBER TERM, A. D. 1928.

FILED

FEB 1 1928

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 41.

AGENDA NO. 36.

ALLIE JONES,
Appellant,

VS.

ILLINOIS BELL TELEPHONE
COMPANY, a Corporation,
Appellee.

: 251 I.A. 629⁴
: APPEAL FROM THE CIRCUIT
: COURT OF PERRY COUNTY.

WOLFE, J.

This action is one of trespass quaro clausum fregit. The declaration alleges that the defendant, on or about the first day of August, 1927, with force and arms broke and entered the close of the plaintiff, in the City of Du Quoin, and planted three large telephone poles thereon and with force and arms broke and destroyed a fence of the plaintiff, etc.

Defendant filed three pleas. The 1st: Not guilty. The 2nd: Librum tenementum. And the 3rd: License, alleging that the supposed trespasses were committed by the defendant by leave and license of the plaintiff.

The plaintiff filed four replications. The 1st: Joinder of issue of the first plea. The second: Denying that the close was not the close and freehold of the defendant. The third: A new assignment with full description of the property of the plaintiff; and the fourth: A denial of the license.

The second and third pleas concluded with a verification. The second and fourth replications tendered

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1920

issue and the third concluded with verification and prayer for judgment.

The defendant filed no rejoinder to the replications, and the case went to trial upon the issues made by the pleadings above set forth, but both parties to this suit agree in their brief and argument that the only issue really involved in the case is: Was the trespass complained of by leave and license of the plaintiff?

At the close of the plaintiff's evidence the defendant presented the Court an instruction to find the issues in favor of the defendant, which instruction was refused. At the close of the evidence for the defendant, the defendant presented an instruction to find the issues in favor of the defendant, which instruction was given to the jury, and the jury, by their verdict so found. The giving of this instruction is practically the only issue involved in the case.

The plaintiff testified that she was unmarried and had lived on the premises in question for the past five years, and that the property on which the telephone company set their poles was the back part of her property; that she did not give her consent to the erection of these poles to any one of the defendant company's men, or any one else; and that no one from the telephone company came to her to see her about putting up the poles, either at the time the poles were placed on her premises, or at any time before. That she sent Mr. McGlasson, her former husband, to stop the workmen from putting in these poles as soon as she learned they were digging holes for that purpose. The plaintiff further testified that the workmen for the telephone company, the defendant, in erecting the poles tore down about thirty feet of fencing on the premises that was used for a chicken yard.

On cross examination the plaintiff testified in regard to the value of the lot at the time it was purchased; also testified that the poles before they were moved were on the Illinois Central Railroad's right-of-way, and were not on her property; that they were not on the inside of her fence line, but were on the other side of the fence on the right-of-way of the Illinois Central Railroad Company, and were not on the front part of her property; that the same number of poles were taken down from the Illinois Central Railroad's right-of-way and placed on the back of her property; and that she had sent Mr. McGlasson out to talk to the telephone people and told him to stop the telephone company from digging the holes.

The warranty deed conveying the premises to the plaintiff, Allie Jones, was admitted in evidence showing, "that the west 20-feet of said tract to be left open for the use of an alley".

Mr. Samuel R. Clark testified that he is the City Clerk of the City of DuQuoin, and there is no record of a public alley back of the premises of the plaintiff; but, that the alley was a private alley.

Mr. Morris McGlasson was called as a witness for the plaintiff and testified that he was the grantor named in the deed conveying the property in question to the plaintiff; and that he was the former husband of the plaintiff. That at the time the telephone company commenced digging on her lot Mrs. Jones was sick. That she asked him to look after it for her. That he stopped the telephone company from digging holes sometime in July. When he came back they had three poles set on her property, and gives a description of how the poles were set. Witness McGlasson further testified that four persons lived on the east side of the alley; that he had sold lots to these people and that the alley is used only by the people that lived on these

lots, or tracts of land; that the drayman use it, but no one uses it except for taking in loads of coal. Witness further testified in regard to his contract with the telephone company giving them the right to set poles on his property; but, he did not at any time, give the defendant company a release to the premises sold to Mrs. Jones after he had sold the property to her, and the release in question had nothing to do with any thing in regard to the property that he conveyed to Mrs. Jones.

Lynn Hammond is called as witness on behalf of the plaintiff and testified that he knew Allie Jones property and worked on the land, raising a garden there this year, and was working in his garden when the telephone poles were planted on the property. The first time he saw the men they were digging the holes on the north corner on the west side of her property. Allie Jones told him if he saw any body working there to stop them; that he went out and asked them 'What right they had to dig that hole?' They said, that Mr. McGlasson and the town gave them the right to dig the holes there. He, Hammond, said, "Brother, she objects to it." That he went to the house to see her and she told him that she did not want them digging there. They just laughed at him like they thought it was a lot of fun. He, Hammond, went up town to see an attorney for Mrs. Jones, but the attorney was not in, so the telephone men worked on and set the poles along the fence line and 'tore down the fence'.

On cross examination Mr. Hammond stated that at the time in question Mrs. Jones was sick for four or five weeks; he never saw her out at all; that she was sick in bed. That the chicken yard fence was not wire, but made out of posts for uprights, something 4 x 4 or 4 x 6's; that he grew garden there for two years and that

the fence was good last spring.

The defendant offered in evidence several witnesses in regard to the location of the poles in front of the property as to whether they were on the private property of the plaintiff, or on the Illinois Central R. R. Company's property; and as to the permission that had been given by the City of DuQuoin to the defendant company to erect the poles in the City of DuQuoin, which under the issue as finally tried in this case we do not deem material.

The only evidence in regard to sustaining the contention of the defendant that these poles were erected by license given them by the plaintiff was by the witness Delano, who testified that he lived in Springfield, Ill., and was employed by the Illinois Bell Telephone Company; that he was in the City of DuQuoin in March 1927 with reference to the new telephone leads. That he called at a house near the south city limits and a lady came to the door, who, he afterwards learned was Allie Jones. That he called for Mr. Bartlett McGlasson, who came to the door; he stated that he was looking for the owner of the property; that he, Mr. Glasson, said he owned the entire property; that the plaintiff did not say anything about it. That later Delano negotiated with McGlasson about putting up poles upon the back of the property and he obtained a permit from McGlasson for so doing.

The defendant called Jesse Thorm, who testified that he was in charge of the gang that put up the poles on the Allie Jones' alley and took down the other poles in front of her property; that the fence was not in good condition; that the nearest they came to the fence was ten or fifteen feet, and none of the men tore the fence down.

That Mr. McGlasson came out and said that he represented Allie Jones; that Mr. McGlasson asked them to quit, and he did quit and waited for orders from the right-of-way man.

And at the close of this evidence an instruction offered by the defendant to find the defendant 'not guilty' was given.

It is conceded by both parties if there was any evidence on which to sustain the plaintiff's case a motion for a directed verdict should not have been given, but it is the contention of the defendant that their defense of 'leave and license' was an affirmative defense and had been proven, and there was no evidence to the contrary.

If the contention of the defendant is right, then the giving of the instruction was proper, but, if there was any evidence that tended to show a dispute of the leave and license given by the plaintiff to the defendant, then the giving of this instruction was error.

The only evidence on which the defendant relies for its 'leave and license' to erect these poles is the evidence of the witness Delano in which he testified that he had a conversation with the former husband of the plaintiff relative to the ownership of this land, and because the plaintiff sat by and did not dispute this evidence, she is estopped from now denying that McGlasson was the owner of the land and had authority to give the defendant company the right to set poles over his land. At no time did Delano say anything in plaintiff's presence about setting poles on this alley; but the evidence is uncontradicted that as soon as she learned that the telephone company was placing those poles on her property she sent Mr. McGlasson to object, and she testifies that she also sent Mr. Hammond to order the company from proceeding with its work. Mr. Hammond testified that he did

tell them to stop their work, and the employees simply laughed at him when he told them.

The plaintiff in her testimony stated positively that she at no time gave her consent to the telephone company for the erection of those poles and telephone line on her property.

The rule as to giving a peremptory instruction to an affirmative defense is the same as giving such an instruction at the close of the plaintiff's case, the Court cannot weigh the evidence, but must be of the opinion that there is no proper evidence denying or controverting the evidence of the defendant. The defendant insists that because Mr. McGlasson, or the plaintiff did not go on the witness stand and deny the conversation as related by the witness Delano that then there is no evidence in the record to contradict it and assuming that the plaintiff has given her consent to have the defendant company to erect poles as has been done. We do not understand this to be the rule, but the whole of the evidence must be considered, and even if there was no denial of the conversation about what had taken place in regard to the plaintiff giving the defendant leave and license to erect these poles, it was a question, the whole evidence being considered, for the jury to decide. We do not think the defendant has shown such a state of facts that would give them a license to enter plaintiff's property and erect these poles.

The fence, while a small matter, was torn down, but, if the plaintiff is right in her contention, the jury should have given her such damages for it as the evidence shows she is entitled to.

The giving of this instruction was reversible error and the judgment of the Circuit Court of Perry County is hereby REVERSED AND THE CAUSE REMAIND. Not to be reported in full.

